No. 88-293-CFX
Status: GRANTED

Title: Community for Creative Non-Violence, et al., Petitioners
v.
James Earl Reid

Docketed:
August 17, 1988

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Garrett,Robert Alan

Counsel for respondent: Kaufman,Joshua

Entry	Date	Note	Proceedings and Orders
1	Aug 17 1988	G	Petition for writ of certiorari filed.
2	Aug 18 1988		Brief amicus curiae of Copyright Justice Coalition filed.
4	Sep 13 1988		Order extending time to file response to petition until October 17, 1988.
5	Oct 17 1988		Brief of respondent Pro se in opposition filed.
6	Oct 19 1988		DISTRIBUTED. November 4, 1988
7	Nov 7 1988		Petition GRANTED.
			**********
8	Dec 21 1988		Brief amicus curiae of Intellectual Property Owners, Inc. filed.
11	Dec 21 1988		Brief amici curiae of Computer and Business Equipment Manufacturers Assco., et al. filed.
9	Dec 22 1988		Joint appendix filed.
10	Dec 22 1988		Brief of petitioners Community for Creative Non-Violence filed.
12	Dec 22 1988		Brief amicus curiae of Magazine Publishers of America, et al. filed.
13	Jan 5 1989	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
29	Jan 5 1989		Lodging received.
16	Jan 13 1989		Order extending time to file brief of respondent on the merits until January 30, 1989.
14	Jan 17 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
17	Jan 30 1989		Brief amicus curiae of Register of Copyrights filed.
18	Jan 30 1989		Brief amicus curiae of Professional Photographers of America, Inc. filed.
19	Jan 30 1989		Brief amici curiae of American Society of Magazine Photographers, et al. filed.
20	Jan 30 1989		Brief amicus curiae of American Intellectual Property Law Assn. filed.
21	Jan 30 1989		Brief of respondent James Earl Reid filed.
23	Feb 3 1989		SET FOR ARGUMENT WEDNESDAY, MARCH 29, 1989. (1ST CASE)
24	Feb 7 1989	G	Motion of Volunteer Lawyers for the Arts Inc., et al. for leave to file a brief as amici curiae filed.
25	Feb 21 1989		Record filed.
		*	Certified copy of original record and proceedings received.
27	Feb 24 1989		CIRCULATED.

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Entry	Date	Note	Proceedings and Orders
26	Feb 27 1989		Motion of Volunteer Lawyers for the Arts Inc., et al. for leave to file a brief as amici curiae GRANTED.
28	Mar 8 1989	X	Reply brief of petitioner Comm. for Creative Non-Violence filed.
30	Mar 29 1989		ARGUED.

88-293

No. 88-

Supreme Court, U.S.
FILED
AUG 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Petitioners,

v.

JAMES EARL REID,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Whether, under the "work made for hire" provisions of the Copyright Act of 1976, 17 U.S.C. §§ 101 and 201(b), Petitioners own the copyright in a statue made by Respondent and others at Petitioners' request and expense and under Petitioners' direct supervision and control.

LIST OF PARTIES

1. Petitioners are the Community for Creative Non-Violence, an unincorporated association of individuals, and Mitch Snyder.

2. Respondent is James Earl Reid.

3. Ronald Purtee was named a defendant in the District Court; however, he did not appear before the District Court or the Court of Appeals.

4. The Copyright Justice Coalition, an ad hoc group of some fifty different organizations, filed an amicus curiae brief in the Court of Appeals in support of Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Petitioners,

v.

JAMES EARL REID,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 846 F.2d 1485 (D.C. Cir. 1988), and is reproduced in the Appendix ("App.") hereto at App. 1a-28a. The opinion of the United States District Court for the District of Columbia is reported at 652 F. Supp. 1453 (D.D.C. 1987), and is reproduced at App. 29a-36a.

JURISDICTION

This case arises under the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* Federal jurisdiction is founded upon 28 U.S.C. § 1338. After a bench trial, the District

Court (Jackson, J.) entered judgment for Petitioners. The Court of Appeals (R. Ginsburg, J.) reversed and remanded in a decision rendered May 20, 1988. No petition for rehearing was filed. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTE INVOLVED

Section 101 of the Copyright Act of 1976, 17 U.S.C. § 101, provides in relevant part:

> A "work made for hire" is
>
> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Sections 201(a) and (b) of the Copyright Act of 1976, 17 U.S.C. §§ 201(a) and (b), provide:

> (a) Initial Ownership. Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.
>
> (b) Works Made for Hire. In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

STATEMENT OF THE CASE

This case calls upon the Court to resolve a direct and acknowledged conflict among four circuits over the proper interpretation of the "work made for hire" ("work for hire") provisions of the Copyright Act of 1976 ("Act" or "1976 Act"), 17 U.S.C. §§ 101 and 201(b).

Under the work for hire doctrine, an "employer" owns the copyright in a work made by an "employee within the scope of his or her employment." The issue on which the courts have divided involves construction of the terms "employer" and "employee," neither of which is defined in the Act. Consistent with case law developed under the Copyright Act of 1909, the Second and Seventh Circuits have held that an employment relationship exists where the artist works at the request and expense, and under the direct supervision and control, of the hiring party. The Fifth Circuit, however, has explicitly rejected this approach and prior case law, relying instead upon factors set forth in the Restatement of Agency Law to determine the existence of an employment relationship. The conflicting approaches are manifest in the present case where the Court of Appeals for the District of Columbia Circuit, reversing the District Court below, expressly aligned itself with the Fifth Circuit and refused to follow the work for hire standard set forth in the Second and Seventh Circuit decisions.

1. *Statement of Facts*

This case involves a dispute over ownership of the copyright in a statue entitled "Third World America"—a contemporary Nativity scene depicting a homeless black family huddled on a streetside steam grate. Petitioners are the Community for Creative Non-Violence ("CCNV"), a non-profit unincorporated association of individuals dedicated to eliminating homelessness in America, and Mitch Snyder ("Snyder"), a member of CCNV. Respondent, James Earl Reid ("Reid"), is a Baltimore, Maryland

sculptor selected by Petitioners to produce certain portions of "Third World America." [1]

The concept for "Third World America" originated with Snyder and other CCNV members who, in early October 1985, decided to produce a work which would serve as a graphic reminder of the nation's homeless.[2] CCNV intended to unveil the work in mid-December 1985 as part of the Christmas Pageant of Peace in Washington, D.C. The work was ultimately to be used as a "centerpiece of a one-or-two-year campaign of education and outreach and fundraising." 2/2 Tr. 24 (Snyder).[3]

At the recommendation of an artist active in the homeless cause (Tom Lewis), Snyder contacted Reid in late October 1985. Snyder informed Reid as to the precise nature and purpose of the work that CCNV wished to have produced (*see* note 2 *supra*), as well as the tight schedule for its production. Reid agreed to work full-time during the ensuing weeks to sculpt the figures for

[1] The statue consists of two separately prepared pieces which were integrated into a "unitary whole"—three life-size figures with the family's belongings stacked inside a shopping cart, and a steam grate and base. *See* 652 F. Supp. at 1454 (App. 30a); 846 F.2d at 1496 (App. 22a). Reid had no involvement in the creation of the base or steam grate. Reid, with a dozen "assistants" whose services were paid for from the funds which CCNV paid to Reid, sculpted the figures.

[2] They determined that the work was to be a sculpture of a modern creche with two homeless adults huddled over their infant child on a streetside steam grate; that the family was to be black because most of the homeless in Washington, D.C. are black; that the figures were to be life-sized; that the steam grate would be positioned on top of a pedestal containing special effects equipment to produce steam swirling around the figures; that the work would be entitled "Third World America"; and that the base would bear the inscription "And Still There Is No Room At The Inn." 652 F. Supp. at 1454 (App. 30a).

[3] The designation "Tr." preceded by a date refers to the transcript of the trial before the District Court below, including the transcript of the hearing on the preliminary injunction motion (which was incorporated into the trial record). The name in parentheses refers to the identity of the witness.

"Third World America" in advance of the Pageant of Peace; however, he did not have time to produce the steam grate and base.[4] Although Reid said he would forgo any salary and donate his services, he estimated that his "production costs" would be between $12,000 and $15,000. Reid explained the nature of these costs, stating:

> . . . I needed a number of assistants and workers to assist me, and I needed materials, and I needed to maintain my quarters, so to speak, which included the rental of my studio and so forth.

2/3 Tr. 155-56 (Reid). CCNV ultimately paid Reid the full $15,000. This amount was raised through a special auction of art works donated by artists who sought to dramatize the plight of the homeless—and who were assured by CCNV that their efforts would not "go to another artist's profit." 2/2 Tr. 100 (Beck).

During the seven-week period when Reid and his several "assistants" worked on the "Third World America" figures, Snyder and other members of CCNV made some ten to fifteen trips to Reid's studio in Baltimore "to make sure that the statue was what [CCNV] wanted it to be." 7/25 Tr. 12 (Snyder). At CCNV's request, Reid came to Washington, D.C. to observe homeless people in the setting CCNV wished to capture in "Third World America." *Id.* at 11-12 (Snyder). CCNV also required Reid to produce design sketches and photographs of the work-in-progress. 2/2 Tr. 39-41, 58-59 (Snyder). Furthermore, Tom Lewis, the artist who recommended Reid and who became one of Reid's assistants, served as a liaison between Reid and CCNV so that CCNV could

[4] CCNV had the steam grate and base constructed at a cost of approximately $7,000 to $8,000. The figures, steam grate and base were assembled together in Washington, D.C. when "Third World America" was placed near the Ellipse. 846 F.2d at 1487-88 (App. 3a-4a); 652 F. Supp. at 1455 (App. 33a).

continuously monitor the progress of the work. 2/2 Tr. 122 (Lewis); 2/2 Tr. 53 (Snyder). Throughout this process CCNV directed Reid as to a number of the details concerning "Third World America."[5] As Lewis testified, "[t]he major decisions about the idea, the placement and the detail . . . were made by Mitch Snyder and CCNV." 2/2 Tr. 124 (Lewis).

Petitioners and Respondent never entered into any written agreement concerning "Third World America." Nor did they have any agreement, written or oral, concerning copyright ownership of that work. The dispute between the parties arose in March 1986 when Reid, who had possession of "Third World America" for purposes of making certain repairs, refused to return the work to CCNV. Reid announced that he intended to take the sculpture on his own exhibition tour, thereby precluding CCNV from going forward with its plans to do the same in order to raise money for the homeless.

2. *Proceedings Below*

Petitioners filed the present lawsuit in June 1986, seeking return of the sculpture and a declaration that they own the copyright in it. The District Court, on Petitioners' motion for a preliminary injunction, ordered the statue's return to CCNV. After a two-day bench trial in February 1987, the District Court entered a final judgment in favor of Petitioners, declaring that Snyder (as trustee for CCNV) owns the copyright in "Third World America" pursuant to the work for hire doctrine.

[5] *See* note 2 *supra*. In addition, CCNV chose the materials for the statue, a synthetic substance called "Design Cast 62" with which Reid had never before worked; Reid had initially proposed bronze. 2/2 Tr. 143-44, 147 (Reid). CCNV rejected Reid's idea to place the family's belongings in "suitcases" or "shopping bags" and directed him instead to construct the shopping cart. 652 F. Supp. at 1455 n.5 (App. 32a n.5). CCNV also rejected Reid's proposal to have the mother seated on the steam grate with the infant in her lap and the father standing behind; CCNV determined that all figures be placed in a recumbent position. *Id.*

In reaching its decision, the District Court focused upon the control that Petitioners had exercised over creation of "Third World America." The District Court concluded that Petitioners were the "motivating factor in the procreation" of "Third World America"; that they "not only conceived the idea" underlying the work, but "did so in starkly specific detail"; and that,

> while much was undoubtedly left to [Reid's] discretion . . . CCNV nevertheless directed enough of his effort to assure that, in the end, he had produced what they, not he, wanted, notwithstanding his creative instincts may have been in harmony with theirs.

652 F. Supp. at 1456 (App. 35a). As the District Court also found, Petitioners paid in full for the work "only when satisfied, upon delivery, that the statue did, indeed, convey the message they had intended for it." *Id.* at 1457 (App. 35a). The District Court rejected Reid's testimony that he had "reserved" copyright in the work and had retained "total [artistic] control" as being "without any corroboration" and "inconsistent with the tenor of the enterprise." *Id.* at 1455 n.3 (App. 31a n.3). Based upon the record, the District Court found that Petitioners "had specific ideas about the sculpture's ultimate appearance which they would have been unwilling to surrender to someone else's 'control,' even the artist's." *Id.* (App. 31a n.3).

On appeal, Reid emphasized that he was not challenging the District Court's findings of fact.[6] Instead, Reid controverted the standard which the District Court utilized for determining whether a work is "made for hire." The Court of Appeals, after discussing the conflicting judicial interpretations of the work for hire doctrine under the Act, agreed with Reid's contention that

[6] *See* Br. for Appellant in Docket No. 87-7051 at 10 (D.C. Cir., filed November 20, 1987); Reply Br. for Appellant in Docket No. 87-7051 at 1 (D.C. Cir., filed January 19, 1988).

the proper standard was the one articulated by the Fifth Circuit in *Easter Seal Soc'y for Crippled Children and Adults of Louisiana, Inc.* v. *Playboy Enterprises, Inc.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988) ("*Easter Seal*")—specifically, that an artist is not an employee under the work for hire doctrine of the Copyright Act unless he or she is an employee under agency law. 846 F.2d at 1492-94 (App. 13a-19a). Applying factors set forth in Restatement (Second) of Agency § 220 (1958) (App. 37a), the Court of Appeals concluded that Reid was not CCNV's employee and, therefore, "Third World America" is not a work for hire. 846 F.2d at 1494 n.11 (App. 19a n.11).

The Court of Appeals expressly rejected the "sufficiently supervised and directed" standard set forth in *Aldon Accessories Ltd.* v. *Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984) ("*Aldon*"), and followed in *Evans Newton Inc.* v. *Chicago Systems Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 107 U.S. 434 (1986) ("*Evans Newton*"). *See* 846 F.2d at 1489-91 (App. 8a-13a). The court made clear, however, that had it considered the *Aldon* standard to represent a proper interpretation of the Act, it would have affirmed the District Court below. *Id.* at 1497 n.18 (App. 25a n.18). The court also determined that "on the record thus far made," "Third World America" may qualify as a "joint work," the copyright in which Petitioners may share with Respondent or perhaps other parties. 846 F.2d at 1495-98 (App. 20a-26a). It remanded this case to the District Court for "comprehensive consideration" of the issues related to "joint works." *Id.* at 1499 (App. 28a).

REASONS FOR GRANTING THE WRIT

I. There Is A Direct And Acknowledged Conflict Among The Circuits Over The Proper Interpretation Of The Work For Hire Provisions Of The Copyright Act Of 1976

There is no question that the Second Circuit and the Seventh Circuit, on the one hand, and the Fifth Circuit and the District of Columbia Circuit, on the other, have reached conflicting interpretations of the work for hire provisions in the Copyright Act of 1976. This conflict is explicitly acknowledged by the Court of Appeals below and by the Fifth Circuit in *Easter Seal*. *See* 846 F.2d at 1487, 1489-94, 1497 n.18 (App. 2a, 8a-19a, 25a n.18); *Easter Seal*, *supra*, 815 F.2d at 328-34. The conflict arises, not in dicta, but from the bases of the courts' decisions.

Under the Second Circuit's analysis in *Aldon*, the critical inquiry is whether the hiring party "sufficiently supervised and directed" the creation of the work. 738 F.2d at 552. If the artist cedes such creative control to the hiring party, an employment relationship exists for copyright purposes, "even though the [artist] was not a regular or formal employee." *Id.*[7] The *Aldon* court recognized that *independent* contractors are not employees. "But that simply frames the issue: is the contractor 'independent' or is the contractor so controlled and supervised in the creation of the particular work by the employing party that an employer-employee relationship

[7] The court in *Aldon* found the work for hire doctrine applicable where the plaintiff conceived the idea of designing certain statuettes and then actively supervised the process by which overseas artisans produced them. In *Evans Newton* the Seventh Circuit upheld a lower court finding that a computer manual produced by defendants, on contract to plaintiff, was a work for hire; according to the court, plaintiff had "supervised and directed the work" while defendants "merely used their programming skills to produce the work according to [plaintiff's] specifications." 793 F.2d at 894.

exists." *Id.*[8] The *Aldon* standard, adopted by the Seventh Circuit in *Evans Newton*, *supra*, 793 F.2d at 894, is consistent with the standard which the courts applied under the 1909 Copyright Act work for hire doctrine. *See Aldon*, 738 F.2d at 552.[9]

The District of Columbia Circuit below and the Fifth Circuit in *Easter Seal* have taken a different view.[10] According to these courts, Congress, without expressly saying so, intended in the 1976 Act to "*radically* revise" the work for hire judicial doctrine that had developed under the Copyright Act of 1909. *Easter Seal*, *supra*, 815 F.2d at 330, 335 (emphasis in original); *see* 846

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[8] A work prepared by an independent contractor may be a work for hire if it meets the criteria set forth in the second subdivision of the Section 101 work for hire definition. *See* page 2 *supra*. The second subdivision defines a "work for hire" as a work "specially ordered or commissioned" if it comes within one of nine specific categories (not including sculptural works) and the parties have a written agreement designating it as a work for hire.

Petitioners do not contend that "Third World America" is a work for hire under subdivision two of the work for hire definition. They rely solely upon subdivision one, which defines a work for hire as a "work prepared by an employee within the scope of his or her employment."

[9] The majority in *Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987), distinguished *Aldon* on its facts but did not controvert the Second Circuit's analysis. The *Aldon* standard has been followed by a number of district courts. *See Easter Seal*, *supra*, 815 F.2d at 333.

Certain artist groups were successful in getting a bill introduced into the 99th and 100th Congresses to overrule *Aldon*. However, neither of these bills has ever been reported out of committee. *See* S. 1223, 100th Cong., 1st Sess. (1987); S. 2330, 99th Cong., 2d Sess. (1986).

[10] The court in *Easter Seal* found the work for hire doctrine inapplicable where the plaintiffs had retained a television station to videotape a parade and "Dixieland jam session" staged by plaintiffs.

F.2d at 1487 (App. 2a) ("we rule that case law on works made for hire developed under the Copyright Act of 1909 . . . no longer holds sway"). The Fifth Circuit framed the standard, which it styled a "literal interpretation" of the 1976 Act, as follows:

> We hold that a work is "made for hire" within the meaning of the Copyright Act of 1976 if and only if the seller is an employee within the meaning of agency law, or the buyer and seller comply with the requirements of § 101(2).

815 F.2d at 334-35.[11] According to the Fifth Circuit, to determine whether an employment relationship exists under "agency law," courts should "consider the sort of factors set out in the Restatement [of Agency (Second) § 220 (1958)] . . . ." *Easter Seal*, *supra*, 815 F.2d at 335. Under the Fifth Circuit's approach, actual control and right to control are "relevant" but not determinative. *Id.* at 335-36.[12]

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[11] The court's reference to "§ 101(2)" means the second subdivision of the definition of "work made for hire" in Section 101 of the Copyright Act, 17 U.S.C. § 101. *See* note 8, *supra*.

[12] The Fifth Circuit in *Easter Seal* identified several district court decisions in which the "literal interpretation" was implicit in the courts' analyses. *See* 815 F.2d at 329.

The Fifth Circuit observed that certain district courts had adopted a third interpretation, which it styled the "conservative" approach. Under this interpretation, a work-for-hire analysis begins with a determination of whether the seller was an employee under Section 101(1). If the work was created at the instance and expense of the buyer, and the buyer had the right—whether exercised or not—to control the work, then the seller is an employee. If the seller is not an employee, the court determines whether the work qualifies as "for hire" under Section 101(2). *See Easter Seal*, *supra*, 815 F.2d at 331. This approach was adopted by the dissenting judge in *Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing Co.*, 810 F.2d 410, 414-15 (4th Cir. 1987) (Hall, J., dissenting).

II. The Outcome Of The Present Case Would Have Been Different Had The Court Of Appeals Below Adopted The Interpretation Of The Work For Hire Provisions Which Has Been Adopted By The Second And Seventh Circuits

A petition for writ of certiorari was filed last Term in the *Easter Seal* case, raising the same general issue as presented here. In response to the Court's request for the views of the United States, 56 U.S.L.W. 3338 (U.S. Nov. 10, 1987), the Solicitor General recommended denial of that petition, explaining:

> We agree that the courts of appeals have adopted conflicting interpretations and that the issue may well warrant resolution by this Court. In our view, however, the outcome of the present case would not have been different under a different interpretation of the work-made-for-hire provisions. Accordingly, the case is not an appropriate vehicle for resolving the issue on which the lower courts are divided.

Brief for the United States as Amicus Curiae at 6, *Easter Seal*, *supra*, No. 87-482 (March 1988) ("Amicus Brief").[13] On March 28, 1988 the Court denied the petition for writ of certiorari in *Easter Seal*. 108 S. Ct. 1280 (1988) (White, J., dissenting).

Unlike *Easter Seal*, the outcome of the present case would have been different had the Court of Appeals followed the approach set forth in *Aldon* and similar decisions. Indeed, the Court of Appeals expressly stated:

> [C]onflict with *Aldon Accessories* is unavoidable. Had we determined that the "sufficiently supervised and directed" test framed in that case correctly construed the 1976 Act, we would have affirmed the district court's judgment declaring Mitch Snyder, as trustee for CCNV, exclusive owner of copyright in the sculptural work "Third World America."

846 F.2d at 1497 n.18 (App. 25a n.18). This conclusion is amply supported by the findings of the District Court below which, focusing upon Petitioners' control over the creation of "Third World America," held in favor of Petitioners. *See* pages 6-7 *supra*. Clearly, therefore, the concerns that prompted the Solicitor General to recommend denial of certiorari in *Easter Seal* are not present here. To the contrary, this case does provide an "appropriate vehicle" to resolve the conflict among circuits concerning the work for hire doctrine.

III. The Conflict Among The Circuits Involves An Important Federal Issue Which Should Be Addressed By The Supreme Court; Numerous Lawsuits And A Variety Of Relationships Within The Copyright Community Are Directly Affected By The Proper Interpretation Of The Work For Hire Provisions

The "prevailing confusion" over the work for hire doctrine, 846 F.2d at 1497 (App. 25a), is a matter of significant concern not only to the parties here, but also to the entire copyright community. As one commentator has observed, "Because about forty percent of all copyright registrations are for works for hire, the interpretation of what is and is not a 'for hire' relationship governs thousands of dealings between artists, writers, and photographers on the one hand, and copyright using industries like publishing, music, and motion pictures on the other." Hardy, *Copyright Law's Concept of Employment—What Congress Really Intended*, 35 J. Copyright Soc'y 210, 210 (1988).

The classification of a work as "made for hire" is, as in this case, critical for purposes of identifying the copyright owner--and thus the party who may license that

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[13] The district court in *Easter Seal*, applying the *Aldon* standard, concluded that no employment relationship existed. *See* 815 F.2d at 333. On appeal, the Fifth Circuit rejected that standard but nevertheless affirmed the district court, observing: "The Easter Seal Society would probably lose on its claim that the field tapes were 'works made for hire' under any view of the 1976 Act." *Id.* at 336.

work to others.[14] Such a classification has other important consequences as well. For example, it affects the duration of the copyright in the work. Copyright normally endures for the life of the authors plus 50 years; copyright in a work for hire, however, lasts for 75 years from publication or 100 years from creation, whichever is shorter. 17 U.S.C. §§ 302(a), (c). Furthermore, Sections 203(a) and 304(c) of the Act, 17 U.S.C. §§ 203(a), 304(c), permit authors unilaterally to terminate transfers of rights in works after a specified period. *See generally Mills Music, Inc.* v. *Snyder*, 469 U.S. 153 (1985) (*"Mills Music"*). These termination rights, however, are not available if the work is a work for hire.

Because of the breadth of the parties and the issues affected by work for hire designations, there has been considerable litigation involving the question of whether a work is made for hire. Indeed, since the Act became effective in 1978, this question has arisen in more than twenty-five reported decisions.[15] As the Solicitor General noted in *Easter Seal*, "the issue on which the lower courts are divided is important . . . ." Amicus Brief at 8.[16]

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[14] As one American Bar Association ("ABA") section recently noted, the "conflict between *Aldon* and *Easter Seal* creates considerable geographic uncertainty about ownership rights." ABA Section of Patent, Trademark and Copyright Law, *Committee Reports* 377 (1988).

[15] In addition to the cases cited or referred to in notes 9 and 12 *supra*, *see, e.g.*, *Sandwiches, Inc.* v. *Wendy's International, Inc.*, 654 F. Supp. 1066 (E.D. Wis. 1987); *Iris Arc* v. *S.S. Sarna, Inc.*, 621 F. Supp. 916 (E.D.N.Y. 1985); *Peregrine* v. *Lauren Corp.*, 601 F. Supp. 828 (D. Colo. 1985); *Gallery House, Inc.* v. *Yi*, 582 F. Supp. 1294 (N.D. Ill. 1984); *Town of Clarkstown* v. *Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983).

[16] This case involves a broader question of whether Congress, in the Copyright Act of 1976, intended to displace certain judicial doctrine which had been developed under the Copyright Act of 1909. *See* pages 10-11, *supra*. The Fifth Circuit and the District of Columbia Circuit have concluded that Congress, without explicitly saying so, intended a "radical" departure from such judicial doctrine; the Second Circuit and the Seventh Circuit have concluded otherwise. Resolution of a conflict of this nature would seem to be especially within the province of this Court.

IV. The Interpretation Adopted Below Is Inconsistent With The Fundamental Policy Underlying The Work For Hire Provisions And Copyright Generally, And Is Not Supported By The Language Or Legislative History Of The Copyright Act of 1976

By focusing on the Restatement of Agency factors rather than on creative control to define the term "employee," the decision below reflects an erroneous interpretation of the Copyright Act of 1976, and should be reversed.[17]

1. The premise of the decision below—that the term "employee" in the work for hire provisions has a "literal" meaning—is itself flawed.[18] In *NLRB* v. *Hearst Publica-*

[17] Even if the work for hire provisions should be defined "literally" by reference to the Restatement of Agency § 220, the decision below cannot stand. Under Section 220(1) of that Restatement (App. 37a), control is not simply *a* "relevant" factor (*Eastern Seal*, 815 F.2d at 336); rather, it is *the* standard for determining the existence of an employment relationship. The various factors set forth in Section 220(2)—to which the Court of Appeals below and the Fifth Circuit in *Easter Seal* looked—are simply *some* of the factors which may be considered in determining whether the control standard is satisfied. But Petitioners clearly met the standard itself. *See* 846 F.2d at 1497 n.18 (App. 25a n.18); 652 F. Supp. at 1456-57 (App. 35a). At the very least, this case should have been remanded so that the relevant facts could have been developed and applied by the District Court below in light of the Court of Appeals' newly-announced standard.

[18] To the extent that the term "employee" has an accepted "literal" meaning, that meaning focuses on control. *See Black's Law Dictionary* 471 (5th ed. 1979) (defining "employee" as a "person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed"). *See also* note 17 *supra*.

tions, Inc., 322 U.S. 111 (1944), the Court rejected the argument that the term "employee," in the National Labor Relations Act ("NLRA"), may be defined by reference to common law factors as set forth in Restatement of Agency § 220. The Court explained that there is no "simple, uniform and easily applicable test" of employment under federal statutes. 322 U.S. at 120. Rather, the question of who is an "employee" for purposes of a particular federal law

> must be answered primarily from the history, terms and purposes of the legislation. The word "is not treated by Congress as a word of art having a definite meaning. . . ." Rather "it takes color from its surroundings . . . [in] the statute where it appears," . . . and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained."

322 U.S. at 124 (citations omitted).[19]

When viewed against the *Hearst* standard, the term "employee" in the work for hire provisions of the 1976 Act is properly defined by reference to creative control.

Indeed, the 1958 Copyright Office study which provided the genesis for the 1976 Act's work for hire provisions (*cf. Mills Music, supra*, 469 U.S. at 159-60) specifically explained the distinction between "employee" works and "commissioned" works in terms of such control:

> [T]he common law generally has differentiated between the employer-employee relationship and that

[19] Congress specifically amended the NLRA to overrule the holding in *Hearst Publications*, by providing that "general agency principles could not be ignored in distinguishing 'employees' from independent contractors." *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971). The general approach to defining employment relationships, as set forth in *Hearst Publications* and quoted above, was not affected by such Congressional action. *See id.*; *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891-92 (1984).

> of the parties to a contract for a commissioned product: in broad terms, the acts of an employee as such are imputed to his employer, but those of an independent contractor are not imputed to the person for whom he performs a special commission. *Underlying this distinction is the premise that an employer generally gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor.* Perhaps in recognition of this principle, the statutory provisions in the United States regarding the employer's ownership of copyright in works made for hire, and the corresponding provisions in the copyright laws of several foreign countries, have not been extended to commissioned works generally.[20]

Similarly, when he recommended that Congress codify the 1909 Act's work for hire doctrine in the copyright revision legislation, the Register of Copyrights explained that this doctrine is predicated, in part, on the "ground" that the "work is produced on behalf of the employer and *under his direction*."[21]

Furthermore, the notion that the work for hire doctrine may be inapplicable where, as here, the hiring party

[20] Varmer, *Works Made for Hire and on Commission*, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. 123, 142 (Comm. Print 1960) (emphasis added).

[21] Register of Copyrights, Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the Copyright Law, 87th Cong., 1st Sess. 85 (Comm. Print 1961) ("1961 Register's Report"). The other "grounds" noted by the Register are that the "employee is paid for the work" and the "employer, since he pays all the costs and bears all the risks of loss, should reap any gain." *Id.*

It should be noted that an employment relationship may be found even where the employee volunteers his or her services. *See* 1 M. Nimmer, *Nimmer on Copyright* § 5.03[B], at 5-12 to 5-13 (1988) (citing authority).

exercises creative control is inconsistent with the purpose of the copyright clause of the Constitution, article I, section 8. As Judge Friendly has observed:

> It is often said . . . that the essential factor in applying the "work for hire doctrine" is "whether the employer possessed the right to direct and to supervise the manner in which the work was being performed." See Nimmer, Copyright § 62.2. *Where the employer in fact tells the employee pretty much what to do, vesting copyright in the former is wholly consistent with the policy of the Copyright Act since the creativity can be said to be primarily the employer's and the employee has simply carried out his instructions.*

Scherr v. *Universal Match Corp.*, 417 F.2d 497, 502 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970) (dissenting opinion) (emphasis added).

2. The courts which construed the work for hire provision in the Copyright Act of 1909 properly focused upon creative control.[22] They made clear that "the hallmark of 'an employment for hire' relationship" under the 1909 Act is whether the hiring party "could have exercised the requisite power to control or supervise [the artist's] work." *Epoch Producing Corp.* v. *Killiam Shows, Inc.*, 522 F.2d 737, 744 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976). *Accord, Scherr* v. *Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970) (*citing* M. Nimmer, *Nimmer on Copyright* § 62.2 (1968)).[23] There is nothing in the

[22] Section 26 of the Copyright Act of 1909, ch. 320, 35 Stat. 1075, provided that "the word 'author' shall include an employer in the case of works made for hire." None of the terms in Section 26 was defined in the 1909 Act.

[23] During the 1963 discussion of the Register's draft legislation (*see Mills Music, supra*, 469 U.S. at 159), one industry spokesman noted:

> The cases do hold that "employment for hire" exists where there is a relationship of "master and servant," that is, where the person receives compensation and *is subject to control and regulation by the person for whom he performs the work.*

Preliminary Draft for Revised U.S. Copyright Law and Discussion and Comments on the Drafts, 88th Cong., 2d Sess., Copyright Law Revision, Part 3, 274 (Comm. Print 1964) (emphasis added).

legislative history of the 1976 Act to indicate that Congress intended to jettison the control standard when it reenacted the work for hire doctrine. *Aldon, supra*, 738 F.2d at 552.

The court below attempts to discern such intent in the fact that the 1976 Act identifies the circumstances in which "specially ordered or commissioned" works qualify as works for hire. As noted above, a "work made for hire" is defined in Section 101 of the Act as *either*

1) a work "prepared by an employee within the scope of his or her employment"; *or*

2) a "specially ordered or commissioned" work which falls within one of nine specific categories if the parties agree in writing that the work is made for hire.

The second definition simply responds to those cases in which the courts had created a "presumption" that an independent contractor assigned his or her copyright to the hiring party and thus came within the work for hire doctrine.[24] It effectively reverses that presumption for the identified categories of commissioned works. It does not, however, either explicitly or implicitly, repudiate the control standard as a basis for distinguishing between "employee" works and "commissioned" works. *Aldon, supra*, 738 F.2d at 552.

The focus of Congressional concern can be seen in *Scherr* v. *Universal Match Corp.*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970). There, the

[24] *See Brattleboro Publishing Co.* v. *Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966); *Yardley* v. *Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940).

Second Circuit held that the copyright in a statue made by plaintiffs belonged to the Government under the work for hire doctrine. The court advanced two separate rationales for this result. First, it reasoned that the statue was a work for hire under the line of cases establishing a presumption that copyright rests in a commissioning party. 417 F.2d at 500. Second, and alternatively, it found the existence of an employment relationship relying upon the control standard. *Id.* at 500-01. The 1976 Act forecloses the former, but not the latter, approach.

3. The court below discerns support for its interpretation in "legislative history" evidencing Congress' "general concern" for "creators." 846 F.2d at 1494 (App. 18a). To the extent that the court equates "creators" with "artists" rather than those who exercise creative control, its position is not supported by the legislative history surrounding the work for hire provisions.

The House Report states that Congress did not intend to change the fundamentals of the work for hire doctrine, but rather to adopt what it considered "one of the basic principles" of the 1909 Act: "that in the case of works made for hire the employer is considered the author of the work. . . ." *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976). There is no indication whatsoever that Congress intended to expand the rights of artists at the expense of the rights of employers. Indeed, Congress rejected artists' proposals, such as the "shop right" doctrine of patent law, which would have granted employers lesser rights than are granted to other authors under the Act. *See id.* Congress also rejected the Register of Copyright's recommendations to designate employers as mere "owners" of copyright and to exclude from coverage all commissioned works. *See* 1961 Register's Report at 86-87. Instead, Congress reaffirmed employers' status as legal "authors" and included nine categories of "commissioned" works that may qualify as works made for hire.

In short, there is no evidence in the legislative history of greater Congressional "concern" for artists than for others who exercise the creative control over a work. Such a bias would, in fact, be contrary to the basic principles of the work for hire doctrine and inconsistent with the Constitutional purpose of copyright law—to encourage the creation and broadest public availability of creative works. *See Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 428-29 (1984); *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975). An employer's ability and incentive to maximize such availability is typically greater than an artist's; the rights granted to the creative force behind a work should be the same whether the true creator is an artist or an employer.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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August 17, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 87-7051

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*

v.

JAMES EARL REID,
Appellant.

Argued Jan. 29, 1988

Decided May 20, 1988

As Amended May 20 and May 31, 1988

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 86-01507)

Robert S. Schlossberg, with whom William L. Gardner and Grace E. Speights, Washington, D.C., were on the brief, for appellant.

Terri A. Southwick, of the bar of the Court of Appeals of the District of Columbia, pro hac vice, by special leave of Court, with whom Timothy D. Junkin and L. Barrett Boss, Washington, D.C., were on the brief, for appellees.

Charles D. Ossola, Washington, D.C., for amicus curiae, The Copyright Justice Coalition.

Before MIKVA, RUTH BADER GINSBURG, and SILVERMAN, Circuit Judges.

Opinion for the Court filed by Circuit Judge RUTH BADER GINSBURG.

RUTH BADER GINSBURG, Circuit Judge:

This case calls for interpretation of the "work made for hire" prescriptions of the Copyright Act of 1976 (1976 Act), 17 U.S.C. §§ 101, 201 (1982).[1] The issue is novel in this circuit and has divided sister courts. *Compare Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*, 815 F.2d 323 (5th Cir.1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1280, 99 L.Ed.2d 491 (1988), *with Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 387, 83 L.Ed.2d 321 (1984), and *Evans Newton Inc. v. Chicago Sys. Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 434, 93 L.Ed.2d 383 (1986).

In the case at hand, the district court held the work for hire doctrine applicable and rested its judgment for the plaintiff on that doctrine. Following the path marked by the Fifth Circuit, we rule that case law on works made for hire developed under the Copyright Act of 1909 (1909 Act) no longer holds sway; in accord with *Easter Seal Society*, 815 F.2d at 324, we conclude that the "1976 Act has greatly restricted the scope of the 'work for hire' doctrine." Based on the construction we hold proper under the current Act, we reverse the district court's judgment and remand the instant case for further proceedings.

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[1] The expression in the statute is "work made for hire." We employ here interchangeably the shorter term, "work for hire."

I.

Plaintiff-appellee in this case, the Community for Creative Non-Violence (CCNV), is a Washington, D.C.-based non-profit unincorporated association devoted to the welfare of homeless people. In the fall of 1985, CCNV decided to participate in the annual Christmas Pageant of Peace in D.C. by sponsoring a display that would dramatize the plight of the homeless. As the district court recounted, Mitch Snyder, CCNV's agent and trustee (also named as a plaintiff-appellee in this action), and other CCNV members

> conceived the idea for the nature of the display: a sculpture of a modern Nativity scene in which, in lieu of the traditional Holy Family, the two adult figures and the infant would appear as contemporary homeless people huddled on a streetside steam grate. The family was to be black (most of the homeless in Washington being black); the figures were to be life-sized, and the steam grate would be positioned atop a platform "pedestal," or base, within which special-effects equipment would be enclosed to emit simulated "steam" through the grid to swirl about the figures. They also settled upon a title for the work—"Third World America"—and a legend for the pedestal: "and still there is no room at the inn."

Community for Creative Non-Violence v. Reid, 652 F. Supp. 1453, 1454 (D.D.C.1987).

Snyder contacted James Earl Reid, a Baltimore sculptor and defendant-appellant herein; in the course of two telephone calls in October 1985, CCNV and Reid reached an agreement. Reid promised to sculpt the three human figures for "Third World America" and a shopping cart containing their meager belongings; he agreed to use a synthetic substance called "Design Cast 62" that could be tinted to resemble bronze. CCNV assumed responsibility for the steam grate and the pedestal. For a total outlay

of approximately $7,000-$8,000, CCNV engaged a cabinet-maker to construct the pedestal, obtained the special-effects equipment from a company in California, and acquired the chemicals needed to produce the simulated steam from Mobil Oil Company in New Jersey. The parties agreed that Reid's portion of the sculpture would cost no more than $15,000, not counting the sculptor's own services, which Reid donated to the venture; they further agreed that Reid's work would be delivered to CCNV by December 12 for attachment to the base preparatory to display of the total creation in the Pageant. Neither party mentioned copyright.

Reid and his assistants worked on the figures for the sculpture throughout November and December, conferring from time to time with various CCNV members and making changes to the form and arrangement of the figures to accommodate CCNV's requests. On December 24, 1985, Reid delivered his portion of "Third World America" to D.C. where it was joined to the steam grate pedestal and placed on display near the site of the Pageant. At that time, Reid received $3,000 from Snyder, the final installment of the $15,000 total payment due to him under the agreement.

In late January 1986, CCNV sent the entire sculpture to Reid so that he could repair damage to the foot of the male figure that occurred in the original transportation from Baltimore to D.C. The following month, CCNV began making plans to take the sculpture on a tour of several cities to raise money for the homeless. Reid objected to the planned tour insisting that the Design Cast 62 material was too delicate to withstand the ambitious itinerary; he urged CCNV to cast "Third World America" in bronze or to have a "master mold" made. CCNV declined to fund these additional undertakings but invited Reid to do so at his own expense.

In March 1986 CCNV asked Reid to return the sculpture; Reid refused. He filed a certificate of copyright

registration for "Third World America" in his own name on March 20, 1986,[2] and announced his own plans to take the sculpture on an exhibition tour more moderate than the one CCNV had projected. Snyder filed a competing certificate of copyright registration in his name on May 21, 1986.[3] On June 2, 1986, CCNV commenced this litigation against Reid. The complaint sought return of the sculpture and a determination of copyright ownership. On July 25, 1986, the district court granted a preliminary injunction ordering Reid to return the sculpture to CCNV. On February 9, 1987, after a two-day bench trial, the district court declared "Third World America" a work made for hire whose copyright is owned exclusively by CCNV. Reid timely appealed that final decision.

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[2] Beneath the title of the sculpture, which was molded into the human figure portion of the work, Reid had placed a copyright notice: "© James Earl Reid, Sculptor 85." This measure, which Reid took before the creation was displayed in D.C., *see* 652 F.Supp. at 1455 n.7, was unnecessary to secure any copyright protection to which Reid might be entitled. Generally, a notice of copyright is required upon publication of copies of a copyrighted work. 17 U.S.C. § 401(a). However, a public display is not a publication. 17 U.S.C. § 101 ("A public performance or display of a work does not of itself constitute publication.").

[3] Snyder filed the certificate of copyright registration in his own name without mentioning CCNV. The district court indicated, however, that Snyder's registration was as CCNV's trustee. *See* 652 F.Supp. at 1457 (declaring copyright vested "in Mitch Snyder, trustee, for the use and benefit of the Community for Creative Non-Violence"). On the prudence of this filing in light of the voluntary and unincorporated nature of CCNV, *see Motta v. Samuel Weiser, Inc.*, 768 F.2d 481 (1st Cir. 1985) (where membership of unincorporated association is too fluid, association is not capable of owning property). For convenience, we will refer to CCNV as the plaintiff-appellee and putative author of "Third World America."

II.

The 1976 Act prescribes that copyright ownership[4] "vests initially in the author or authors of the work," and that "authors of a joint work are coowners of copyright in the work." 17 U.S.C. § 201(a). As to a work made for hire, the Act provides that

> the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

17 U.S.C. § 201(b). "Work made for hire" is defined in the Act as

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use [1] as a contribution to a collective work, [2] as a part of a motion picture or other audiovisual work, [3] as a translation, [4] as a supplementary work, [5] as a compilation, [6] as an instructional text, [7] as a test, [8] as answer material for a test, or [9] as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.
>
> . . .

[4] The dispute between CCNV and Reid concerns only ownership of *copyright* in "Third World America," not ownership of the sculpture itself. *See* 17 U.S.C. § 202 (ownership of copyright is distinct from ownership of material object). Having paid Reid the agreed price of $15,000, CCNV owns the sculpture. Ownership of a particular copy of a copyrightable work—in this case the original "copy," *see* 17 U.S.C. § 101 ("[t]he term 'copies' includes the material object . . . in which the work is first fixed")—vests certain rights under the 1976 Act in that owner. Among these are the right to "sell or otherwise dispose of the possession of that copy" and the right to "display that copy publicly." 17 U.S.C. § 109(a), (c). In light of this distinction between ownership of a particular copy and ownership of a copyright, Reid's retention of the sculpture —the behavior that precipitated CCNV's plea for a preliminary injunction—lacked legal foundation. Even if Reid had solely owned the "Third World America" copyright, CCNV's exclusive ownership of the sculpture itself would have left Reid with no right to possess that material object. *See infra* pp. 1498-99.

17 U.S.C. § 101 (numbers in brackets added). Our task is to determine where the contending parties fit within this statutory framework, specifically, is Reid an "author" of the sculpture "Third World America," as that term is used in the section on ownership of copyright, § 201, or is CCNV the only party "considered the author"? The provision in § 101 defining "work made for hire" is key to this inquiry.

The first subpart of the § 101 "work made for hire" definition concerns work prepared in an "employment" setting; the second concerns works "specifically ordered or commissioned." Does the distinction Congress made between "employment" in § 101(1) and "commissioned" work in § 101(2) mean, the Fifth Circuit asked in *Easter Seal Society*, 815 F.2d at 328, that the work of an independent contractor can be placed in the "work made for hire" category only when the work is of a type § 101(2) describes in its nine tightly-drawn categories (and, even then, only when the parties so agree)? The Fifth Circuit, in disagreement with the Second and Seventh Circuits, answered this question affirmatively.[5] We set out below the conflicting interpretations advanced in recent circuit decisions, align ourselves with the Fifth Circuit's position, and then consider whether "Third World America" may qualify as a joint work of art, with copyright in the work co-owned by two or more authors. *See* 17 U.S.C. § 101 (definition of "joint work").

[5] In *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987), the Fourth Circuit, although rejecting the specific work for hire assertion there at issue, indicated its agreement with the Second Circuit.

A. The Second and Seventh Circuit Interpretation

The 1909 Act defined the word "author" to include an employer in the case of works made for hire, 17 U.S.C. § 26 (repealed 1976), but did not further delineate the "work made for hire" domain. Case law interpreting that Act treated expansively the relationships that qualified under the employer-employee rubric; a test of actual control by the commissioning party slackened to become a right to control (even if not exercised) standard. Ultimately, a firm presumption developed under which virtually "any person who paid another to create a copyrightable work" counted as the statutory "author" within the compass of the work for hire doctrine. *See Easter Seal Society*, 815 F.2d at 327; *see generally* Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U.PA.L.REV. 1281, 1282-89 (1987). First among the federal courts of appeals to consider what change the 1976 Act had wrought in the work for hire domain, the Second Circuit, in *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 387, 83 L.Ed.2d 321 (1984), held that only a modest alteration had been made: Congress had corrected exorbitant case law that "worked an injustice in those situations where the contracting party did all of the creative work and the hiring party did little or nothing." 738 F.2d at 552.

Aldon Accessories noted the two subsections of the statutory (§ 101) "work made for hire" definition, and emphasized the first subsection: "a work prepared by an employee within the scope of his or her employment." That subsection, according to the Second Circuit, retains in place prior case law ranking as "employees" whose labors yield works for hire "[independent] contractors who were actually sufficiently supervised and directed by the hiring

party." *Id.*[6] Under *Aldon Accessories*, if there is the requisite supervision and control, the commissioning party is deemed the author and sole owner of copyright in the work.[7]

In more cryptic statement, *Aldon Accessories* addressed the second subsection of § 101's "work made for hire" definition, the subsection delineating nine categories of "specially ordered or commissioned" works. Assuming the

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[6] Doubtless, the *Aldon Accessories* court intended to apply the "actually sufficiently supervised and directed" test only to determine whether independent contractors are employees. The copyrightable work of "regular or formal" employees is work made for hire without regard to the employer's exercise of control. *See Easter Seal Society*, 815 F.2d at 334 ("Under *Aldon Accessories*, a court must still determine whether the [creator of the copyrightable work] was an employee or independent contractor because the [actual control] test applies only to independent contractors.").

[7] The attribution under the work for hire doctrine of authorship as well as ownership of the copyright yields significantly more than would acquisition of copyright ownership alone. The copyright of a work made for hire on or after January 1, 1978 "endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first." 17 U.S.C. § 302(c). Ownership of copyright alone, which would occur upon an author's grant of a transfer or license of copyright, leaves the author with a right to terminate the grant in 35 or 40 years. *See* 17 U.S.C. § 203(a)(3). Book publishers and motion picture producers had strongly opposed complete exclusion of commissioned works from work for hire treatment in the 1976 Act; their concern focused on the author's termination right exercisable "[i]n the case of any work other than a work made for hire," 17 U.S.C. § 203(a). *See* Hamilton, *supra*, 135 U.PA.L.REV. at 1292 (capping discussion with pointed observation that "the creator of a work made for hire . . . could never terminate the employer's right to the work"). The consequences in foreign jurisdictions of recognizing the commissioned rather than the commissioning party as author also figured in the legislative debates. *See* Angel & Tannenbaum, *Works Made for Hire Under S.22*, 22 N.Y.L. SCH.L.REV. 209, 213-14 (1976); *see generally* 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 5.03[A] (1985) (significance of work for hire status).

absence of the supervision-by-hiring-party ingredient, *Aldon Accessories* recognized that the independent contractor in these situations is sole author and copyright owner unless, as § 102(2) stipulates, "the parties expressly agree in a written instrument signed by them that the work should be considered a work made for hire." *Aldon Accessories* did not home in on the case of the independent contractor who is not "sufficiently supervised and directed by the hiring party," but whose commissioned work is not within the nine categories set out in § 101's second subsection.

We pause here to observe that unlike the instant case, in which artist and commissioning party vie for ownership of a copyright, *Aldon Accessories* pitted the commissioning party (to boot, a genuinely creative participant) against a third-party infringer (and a blatant one at that). Plaintiff Aldon Accessories Ltd. (Aldon) was in the business of designing and marketing decorative objects. In 1977, one of Aldon's two principals conceived of a novel line of statuettes depicting mythical creatures, notably a Pegasus and a unicorn. Aldon first commissioned a Japanese firm to aid in the design of the figurines and to produce the creations in porcelain. Some two years later, Aldon commissioned a Taiwanese firm to produce brass versions of the statuettes. In 1980, Aldon filed certificates of copyright registration for the statuettes; Aldon listed itself as the author but indicated that the works were "made for hire." In 1981 a buyer for Spiegel, Inc. (Spiegel) saw Aldon's brass unicorn at a gift show. At the Spiegel buyer's request, Aldon sent samples. By mid-1981, Spiegel was selling through its catalog brass unicorns identical to Aldon's. Aldon sued Spiegel for copyright infringement.

On appeal from a judgment for Aldon, Spiegel argued that the statuettes could not be works made for hire under the 1976 Act because statuary does not fall into one of the nine categories enumerated in the second subsection of the § 101 definitional provision. Therefore Aldon could not be the author and copyright owner of the brass unicorn, Spiegel contended, and could not sue for copyright infringement. Understandably, Spiegel's argument did not succeed.

The record in *Aldon* demonstrated the very active participation of Aldon's principal every step of the way, from conception of the statuettes to "[standing] over the artists and artisans at critical stages of the process, telling them exactly what to do." 738 F.2d at 553 (commenting that "in a very real sense," Aldon's principal "was the artistic creator"). In this light, Spiegel's liability for infringement could have been upheld by recognizing Aldon as at least "a co-author of the work" and, as joint owner of the copyright, one clearly "entitled to bring and win an action for infringement against a third party." *Easter Seal Society*, 815 F.2d at 333; *cf. Mister B Textiles Inc. v. Woodcrest Fabrics, Inc.*, 523 F.Supp. 21, 24 (S.D.N.Y.1981) (rejecting, upon finding co-authorship, infringer's objection that plaintiff commissioning party did not own the copyright).[8]

Two years after the Second Circuit's decision, the Seventh Circuit adopted the *Aldon Accessories* "sufficiently supervised and directed" test; in *Evans Newton*

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[8] Hamilton, *supra*, at 1302-03 & n. 118, suggests additional ways of viewing the *Aldon Accessories* situation. One might regard Aldon as sole author and owner of the copyright (Henry Moore, for example, engaging others to execute his fine art). The foreign producers thus could be seen as simply instrumental (Hamilton's analogy is the stenographer recording lines dictated by a poet). Or, the brass statuettes could be regarded as derivative of the porcelain works made in 1977 and thus subject to the 1909 Act, which remained in force until 1978, an act courts ever more certainly construed to sweep commissioned works broadly into the work for hire domain. *See supra* p. 1489; *see also* Hamilton, *supra*, at 1301 n. 112 (indicating that the Japanese and Taiwanese contractors might not have been positioned to assert protection in the U.S. against copiers of the statuettes).

Inc. v. Chicago Sys. Software, 793 F.2d 889 (7th Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 434, 93 L.Ed.2d 383 (1986), the court relied on *Aldon Accessories* to affirm a judgment of infringement against an independent contractor commissioned by the plaintiff to develop a software program. The contractor, after completing work for the plaintiff, attempted to market a competing program. In defense of its conduct, the contractor claimed it was a co-author and co-owner of the copyrighted work, and therefore could not be an infringer.

The parties in *Evans Newton* had not "expressly agree[d] in a written instrument signed by them" that work would constitute a "work made for hire," 17 U.S.C. § 101, nor was a software program even in the § 101(2) catalog, and the court accepted the contractor's assertion that work for hire status within § 101's definition therefore turned on a characterization question: was the contractor an "employee"? *See* 793 F.2d at 893. On that question, *Aldon Accessories* instructed that the commissioning party's "supervision and direction" of the contractor was decisive. "The evidence at trial" on the point "essentially came down to a credibility contest," the court of appeals said, so that the district court's finding of sufficient supervision could not be held "clearly erroneous." *Id.* at 894.

The evidence of "actual control" in *Evans Newton*, it has been observed, was less compelling than the showing of constant direction of the work in *Aldon Accessories*. *See Easter Seal Society*, 815 F.2d at 334 ("[T]he 'actual control' test of *Aldon Accessories* . . . slides too easily into the vague and expansive 'right to control' test, as the decision in *Evans Newton* may portend."). In the cases before us, we note that the district court, while citing *Aldon Accessories* and examining with care CCNV's interactions with Reid, used language harking

back to the "payor presumed to control" approach that evolved under the 1909 Act. The district court wrote: "If the putative 'employer' was either the 'motivating factor' in the production of the work, or possessed the *right* to 'direct and supervise' the manner in which the work was done, the copyright is his no matter the degree of creative license actually exercised by the artist-employee." *Community for Creative Non-Violence v. Reid*, 652 F.Supp. at 1456 (emphasis added).

B. *The Fifth Circuit Interpretation*

The Fifth Circuit panel in *Easter Seal Society* confronted and comprehensively explored this stated issue: "What effect, if any, did the Copyright Act of 1976 have on the 'work for hire' doctrine developed under the 1909 Act?" 815 F.2d at 324. The *Easter Seal Society* opinion first surveys the work for hire precedent that evolved under the 1909 Act, and then identifies and discusses three distinct interpretations of the 1976 Act. 815 F.2d at 328.

The Fifth Circuit panel presented first a position it designates the "literal interpretation." Summarily stated. that interpretation reads section 101

> as a reflection of a simple dichotomy in fact between employees and independent contractors. In other words, a court should first determine—using agency law rules—whether or not the seller is an employee or an independent contractor. Then, the court should apply the statute. Section 101(1) applies to sellers who are employees. If the work was in the scope of employment, an agency-law employee is a copyright employee, and the employer is the "author." Section 101(2) applies to independent contractors. All works by independent contractors—"work[s] specially ordered or commissioned"—are *not* works for hire unless the work comes within the nine nar-

> row statutory categories *and* parties agree in a signed instrument. Section 101(2) is really statutory *permission* for certain kinds of independent contractors to give "authorship" to their buyers.

Id. at 329 (footnote omitted).[9] As the Fifth Circuit noted, the enumeration in subsection (2) affords telling support for the literal interpretation, for a common thread unites the nine precisely-defined categories: "All involve situations where, in addition to owning the copyrights in the works by contract, it would be very useful for [commissioning parties] to be able to become statutory 'authors.'" *Id.*[10]

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[9] The Fifth Circuit employs the terms "buyer" and "seller" throughout its opinion. "A 'buyer' is the putative legal employer claiming ownership under the 'work for hire' doctrine"; "a 'seller' is the person against whom a buyer claims, whether an employee or an independent contractor." *Easter Seal Society*, 815 F.2d at 329. We have employed, in place of the Fifth Circuit's "buyer" and "seller," the terms "commissioning party" and "commissioned party" or "independent contractor."

[10] CCNV argues that Reid should be precluded from urging before this court the Fifth Circuit's interpretation of the work for hire doctrine because he relied on the Second Circuit's view of the doctrine before the district court. CCNV incompletely portrays the record. The Fifth Circuit decision in *Easter Seal Society* had not yet issued at the time of the district court's decision in this case, but Reid in fact tendered to the district court an alternate position on all fours with the one thereafter announced in *Easter Seal Society*. In his Answer, for example, Reid asserted that "the sculpture is not a 'work for hire' in that [Reid] was never an employee of [CCNV], and that under the [1976 Act] the subject matter of the work did not come within the purview of the designated categories of [17 U.S.C. § 101(2)]. . . ." Answer to Complaint for Declaratory Judgment ¶ 8. Similarly, in his Pre-Trial Statement, Reid maintained that he is not an employee, that no written agreement figures in this case, and that the work at issue does not fall within the nine categories enumerated in § 101(2). Defendant's Pre-Trial Statement at 7-8. These passages, one need not strain to recognize, advance the "literal interpretation."

We are particularly impressed by scholarly commentary on the legislative history of the 1976 Act and the almost unanimous support that commentary provides for the literal interpretation. *See* W. PATRY, LATMAN'S THE COPYRIGHT LAW 122 (6th ed. 1986) ("Congress adopted the Copyright Office's intent to limit the types of works created by independent contractors that could be deemed works made for hire to the specified examples given in the second subdivison of the statutory definition, ensuring that, contrary to some decisions construing Section 26 of the 1909 Act, works made for hire within the meaning of the 'first' definition would be limited to salaried or like employees and would *not* include independent contractors even if their work was closely supervised or controlled. The second subdivision of the 'work made for hire' definition was thus intended to be the exclusive provision governing works created by independent contractors.") (footnote omitted); A. LATMAN, R. GORMAN, & J. GINSBURG, COPYRIGHT FOR THE EIGHTIES: CASES AND MATERIALS 242 (2d ed. 1985) ("[D]id the [*Aldon Accessories*] court improperly blur an attempted statutory distinction between works created by 'employees' and 'specially ordered or commissioned works,' a distinction designed by Congress to give commissioned persons greater copyright ownership rights than they had under the 1909 Act cases?"); Fidlow, *The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification*, 10 HASTINGS COMM/ENT L.J. 591 (1988); Hamilton, *supra*, at 1292-93 ("[F]rom a preliminary draft that excluded all commissioned works from the work-made-for-hire rubric, the copyright law revision developed into a final bill wherein only certain, specified categories of commissioned works could be considered as works made for hire.") (footnote omitted); Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 900-01 (1987); Note, *The Freelancer's Trap: Work*

for Hire Under the Copyright Act of 1976, 86 W. VA. L. REV. 1305, 1321 (1984) ("With regard to works prepared on special order or commission, the . . . definition [of the 1976 Act], which alters completely the status of commissioned works, represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered works made for hire under certain circumstances.") (footnote omitted); *see also* 1 M. NIMMER & D. NIMMER, *supra* note 8, § 5.03[B][2][a], at 5-18 (apparently supporting the literal interpretation but attempting to reconcile contradictory cases); Angel & Tannenbaum, *supra* note 8, at 293 (writing in support of literal interpretation at time 1976 Act was enacted). *But see* O'Meara, *"Works Made for Hire" Under the Copyright Act of 1976—Two Interpretations*, 15 CREIGHTON L. REV. 523 (1982) (supporting conservative interpretation discussed *infra*).

The Fifth Circuit referred next to the "conservative interpretation," one that preserves in large part the work for hire doctrine developed under the 1909 Act. *See* 815 F.2d at 331. The critical questions for the "conservative interpretation" are whether the work was created at the commissioning party's "instance and expense," *id.* at 327, and whether that party "had the *right* to direct and supervise the manner in which the work was being performed." *Id.*, quoting *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir.1978) ("Actual exercise of [the] right [to direct and supervise the manner in which the work was being performed] is not controlling, and copyright is vested in the employer who has no intention of overseeing the detailed activity of any employee hired for the very purpose of producing the material."); *see also Scherr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir.1969) (same), *cert. denied*, 397 U.S. 936, 90 S.Ct. 945, 25 L.Ed.2d 116 (1970). Under this reading, section 101 carves out a set of very narrow exceptions to the broad "right to control" test, *i.e.*, the familiar right

to control test holds sway for all but the nine categories of commissioned works enumerated in subsection (2); for works falling within these categories the statute requires a written agreement to make the commissioning party the author and exclusive owner of the copyright. The district court in the case before us did not distinguish the *Aldon Accessories* "actually sufficiently supervised" interpretation from this conservative "right to supervise" interpretation. Citing *Aldon Accessories* in conjunction with *Murray v. Gelderman*, the district court homogenized the two interpretations, *see* 652 F.Supp. at 1456, just as courts and commentators had blended these readings during the evolution of the work for hire doctrine under the 1909 Act.

The Fifth Circuit commented that the "[conservative] interpretation, unlike the 'literal' one, makes the nine narrow categories in § 101(2) completely mysterious." *Easter Seal Society*, 815 F.2d at 331. Why would Congress want to afford a translator, for example, shelter from an expansive "work for hire doctrine" that leaves a sculptor or a composer unprotected, the *Easter Seal Society* panel asked. The § 101(2) enumeration does make sense, in the context of the "literal interpretation," *Easter Seal Society* observed, because the activities listed "look like the kind of activities where the buyer normally wants and needs to be a statutory author in order to gain complete initial ownership of a collaborative project." *Id.*

Finally, the Fifth Circuit examined as a "third view" the *Aldon Accessories* "actually sufficiently supervised and directed" test, discussed *supra*. Summarizing its examination, the *Easter Seal Society* court listed four problems with the *Aldon Accessories* approach:

> (1) the [actual control] rule is unnecessary in cases where "work for hire" is raised by the defendant to question the validity of the plaintiff's copyright since any plaintiff who actually controls an inde-

> pendent contractor will be a co-author of the work; (2) it makes the outcome of "work for hire" analysis too fact-specific for each work and therefore less predictable by buyers and sellers; (3) it does not eliminate the need for a determination of employee versus independent contractor since the "actual control" test applies only to independent contractors; (4) it slides too easily into the vague and expansive "right to control" test, as the decision in *Evans Newton* may portend.

Id. at 334.

In settling on the literal interpretation as most consistent with the language, history, and policies of the 1976 Act, the *Easter Seal Society* court mentioned two factors that gave it pause. First, the Fifth Circuit panel underscored this § 201(b) language: "In the case of a work made for hire, the employer *or other person for whom the work was prepared* is considered the author for purposes of this title. . . ." Under the literal interpretation, the *Easter Seal Society* court observed, those words are operative only as to the narrow class of non-employer commissioning parties "who can be authors by compliance with the requirements of § 101(2)." 815 F.2d at 330. We agree that the § 201(b) words draw their meaning from § 101, but we do not think that factor renders the literal interpretation problematic.

Second, the Fifth Circuit expressed some doubt whether "Congress intended to *radically* revise 'work for hire' doctrine." *Id.* (emphasis in original). We are less doubtful on that score as well. The legislative history, as cogent commentary recounts, *see supra* pp. 1492-93, reveals both a general concern that creators receive fair recompense and a specific decision, set down in § 101, to separate commissioned works from works made in an employment setting. *See particularly* Hamilton, *supra*, at 1290-94 (observing, *inter alia*, at 1293, that "the amount

of deliberations that went into enumerating which types of commissioned works could be treated like employee-created works made for hire indicates that Congress intended for there to be a meaningful distinction between employee-created and commissioned works," thus case law on works made in an employment context "could remain viable," but 1909 Act precedent "relating to commissioned works could not").

Satisfied that the literal interpretation is the one that best suits the 1976 Act, we hold that a copyrightable work of an independent contractor cannot be a work made for hire under the current Act unless that work falls within one of the specific categories enumerated in § 101(2) *and* "the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." 17 U.S.C. § 101(2). It follows from this that "Third World America" does not qualify as a work made for hire, for Reid was an independent contractor and not an employee of CCNV within the rules of agency law;[11] furthermore, sculpture surely is not a category of commissioned work enumerated in § 101(2), and no written agreement existed between CCNV and Reid.

With the work for hire doctrine removed from the case, we turn to the proper resolution of this controversy.

III.

CCNV sought a declaration of copyright ownership. We have held that CCNV is not author of a work made for hire and see no other basis for a claim that CCNV is sole owner of copyright in "Third World America."

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[11] Reid, a fine artist, donated his services, worked in his own studio, and personally engaged assistants when he needed them. Creating sculptures was hardly "regular business" for CCNV. Given these matters of fact, *see* Restatement (Second) of Agency § 220 (1958), we think it evident that Reid was not CCNV's employee, nor do we understand CCNV to contend otherwise.

But neither does the existing record bear out Reid's assertion that he is the exclusive owner of copyright in the work. The facts thus far found by the district court, however, indicate that "Third World America" may indeed qualify as a joint work. To guide the district court on remand, we set out here the relevant statutory prescriptions and relate them to the record as it now stands.

"Copyright in a work . . . vests initially in the author or authors of the work." 17 U.S.C. § 201(a); "[t]he ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . . ." 17 U.S.C. § 201(d)(1). Neither side contends that any conveyance or operation of law has effected a transfer of copyright ownership in the work in question, thus a determination of authorship of the sculpture will constitute simultaneously a determination of copyright ownership.

"Ownership of a copyright," the 1976 Act states, "is distinct from ownership of any material object in which the work is embodied." 17 U.S.C. § 202. "Transfer of ownership in any material object, including the copy . . . in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object;[12] nor, in the absence of an agreement, does transfer of ownership of a copyright . . . convey property rights in any material object." *Id.* Because material object and copyright do not travel together unless the parties so arrange, Reid's transfer of the "Third World America" figures to CCNV left copyright ownership of the work unaffected.

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[12] The 1976 Act thus definitively rejects the common law presumption, *see Pushman v. New York Graphic Soc., Inc.*, 287 N.Y. 302, 39 N.E.2d 249 (1942), that an artist sells the copyright upon sale of the material object. *See also* 17 U.S.C. § 204(a) (written instrument required to convey copyright); 17 U.S.C. § 301(a) (preemption of state common and statutory law).

"Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . ." 17 U.S.C. § 102(a) (§ 102(a)(5) lists as "[w]orks of authorship" "pictorial, graphic, and sculptural works"). The sculpture in question, it is evident, qualifies for protection as an "original work of authorship." *See, e.g., Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir.1951) ("'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary.") (footnote omitted). We consider it plain as well that, intense as CCNV's participation in the project may have been, Reid, as sculptor, contributed more than a minimal amount of creativity to "Third World America." That is enough, once the work for hire doctrine is out of the picture, to render him an author of a protected work.[13] Indeed, Reid contends he is the sole author and exclusive owner of the copyright. We now state why the record before us does not establish that contention.

The idea to be expressed in the work, as the district court indicated, remained constant from the time Snyder and fellow CCNV members first conceived it: the sculpture was to depict "homeless people huddled on a street-side steam grate." 652 F.Supp. at 1454. Reid asserts no large role in the creation of the special effects pedestal designed to simulate a grate emitting steam. CCNV hired a cabinetmaker to construct the steam grate pedestal portion of the sculpture and obtained the special-effects equipment from sources in Hollywood. Thus Reid cannot possibly have solely "authored" the steam grate portion of the sculpture. Reid so recognizes; however, he ques-

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[13] In this regard, we reject the district court's suggestion that Reid may have played a purely instrumental role in the creation of "Third World America." *See* 652 F.Supp. at 1456 (CCNV "engaged Reid to utilize his representational skills, rather than his original artistic vision. . . .").

tions whether CCNV is the author of the base, and whether the base is copyrightable.

The 1976 Act defines a joint work as one "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101. "Third World America," on the record thus far made, fits that description.[14] From the original conception of the work through its completion for display on Christmas Eve 1985, "the modern Nativity scene" appears to have been treated by those who labored to create it as a unitary whole. *See* 652 F.Supp. at 1454. This much, at least, is undisputed: Reid constructed the figures so that they would huddle on, and could be affixed to, the steam grate pedestal; and once the whole was composed, it was not disassembled. CCNV transported the entire work to Reid in January 1986 for the needed repair. Similarly, in March 1986, when CCNV demanded the return of "Third

[14] Reid objects to our consideration of CCNV's suggestion that it is "*at the very least* joint owner of the copyright in the statute. . . ." Brief for Appellee at 24 n. 15. Joint ownership, Reid maintains, was not urged before the district court. As we observed *supra* note 10, the Fifth Circuit decision in *Easter Seal Society* had not yet issued at the time of the district court's decision declaring CCNV sole owner of the copyright. Our adoption of the "literal interpretation" has so fundamentally changed the legal framework for this case that we deem it in order now to entertain CCNV's alternate joint authorship claim. We refrain, however, from ruling dispositively on the issue; instead, we accord Reid an opportunity to develop before the district court any factual or legal arguments he wishes to present in answer to CCNV's alternate claim to joint authorship. *See Meehan v. Macy*, 425 F.2d 469, 472 (D.C. Cir. 1968) (analyzing nature and implications of intervening Supreme Court decision but ordering remand to "permit introduction of additional evidence and argument on points that have a significance . . . previously only dimly discerned"), *aff'd per curiam on rehearing en banc*, 425 F.2d 472 (D.C. Cir. 1969); *see also Thompson v. Kennickell*, 836 F.2d 616, 621 (D.C. Cir. 1988) (remanding in light of intervening Supreme Court decision).

World America," Reid retained the entire construction, not just the figures he had sculpted.

Nor does it appear—again, we caution, from the current record—that the steam grate pedestal is so insignificant a contribution to the work of art that it fails to reflect the requisite "originality" and "authorship." As we have already indicated, *see supra* p. 1495, the standard for determining whether a creation is an "original work of authorship" is not high. "It suffices if the author refrains from copying from prior works and contributes more than a minimal amount of creativity." A. LATMAN, R. GORMAN & J. GINSBURG, *supra*, at 29; *see also* 1 M. NIMMER & D. NIMMER, *supra* note 8, § 6.03, at 6-6 and § 6.17, at 6-18 (joint authors need not "work in physical propinquity"; their contributions need not be equal either quantitatively or qualitatively; though contribution of each must be more than *de minimis*, one may qualify as a joint author even if his contribution, "standing alone would not be copyrightable").[15]

Reid observed, in resisting joint work characterization, that "[c]opyright protection does not extend to utilitarian works and the base certainly has utilitarian and functional aspects." Reply Brief at 17. The first part of this observation is more secure than the second. The 1976 Act defines "useful article" as one "having an intrinsic utilitarian function *that is not merely to portray the appearance of the article*. . . ." 17 U.S.C. § 101 (emphasis added). The steam grate pedestal on which "Third

[15] If Nimmer is correct on the point that the contribution of a joint author need not be copyrightable "standing alone," even CCNV's choice of the title "Third World America" and the legend for the pedestal, 652 F.Supp. at 1454, while not independently copyrightable, *see* W. PATRY, *supra*, at 45-47, may count, along with other CCNV contributions, toward meeting the "more than *de minimis*" threshold required for joint authorship.

World America's" figures huddle surely was designed and constructed precisely "to portray the appearance of" an actual streetside grate.

Most prominently undercutting Reid's claim of sole authorship, the district court found that CCNV "was the motivating factor in the procreation of 'Third World America,' " "conceived the idea in starkly specific detail," and "directed enough of [Reid's] effort to assure that, in the end, he had produced what [CCNV] not he, wanted. . . ." 652 F.Supp. at 1456.[16] In making this point, we do not overlook the "idea/expression dichotomy"; as stated in the 1976 Act, "[i]n no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is . . . embodied in such work." 17 U.S.C. § 102(b). *See, e.g., Meltzer v. Zoller*, 520 F.Supp. 847, 857 (D.N.J. 1981) (dispute over copyright interest in architectural plans for plaintiff's home; plaintiff contributed ideas and sketches, made certain changes, and exercised approval power; plaintiff's contributions were held insufficient to constitute "fixed expressions of ideas," hence plaintiff could not be considered an "author" or "joint author" of the plans); *see generally*, W. PATRY, *supra*, at 116. "Third World America," however, was more than CCNV's abstract idea. Following CCNV's original conception of the sculpture, Snyder and other CCNV members, the district court found, monitored the progress of the work, not simply to approve Reid's embodiment of their idea, but to guide his expression and coordinate with his effort

[16] The district court found, in particular, after hearing conflicting testimony, that the reclining, rather than standing or sitting, posture of the figures was CCNV's idea, not Reid's, and that it was also CCNV's idea to use a shopping cart instead of suitcases or shopping bags as the repository for the homeless family's belongings. 652 F.Supp. at 1455 & n. 5.

CCNV's construction of the steam grate pedestal. *See* 652 F.Supp. at 1455-56.[17]

In sum, were it not for the prevailing confusion over the work for hire doctrine,[18] this case—once more taking the record in its current state—might qualify as a textbook example of a jointly-authored work in which the joint authors co-own the copyright. We note in this regard Reid's original and creative contribution to the figures; CCNV's contribution to the steam grate pedestal added to its initial conceptualization and ongoing direction of the realization of "Third World America"; and the various indicia of the parties' intent, from the outset, to merge their contributions into a unitary whole, and not to construct and separately preserve discrete parts as independent works. *See Strauss v. Hearst Corp.*, 1988 Copyright L.Rep. (CCH) ¶ 26,244 (S.D.N.Y.) (magazine's initial conceptualization, ongoing supervision, and creative contributions to photo layout indicate

[17] Case law concerning joint authorship in relation to the idea/expression dichotomy is sparse largely because the broad scope of the work for hire doctrine under the 1909 Act tended to draw disputes in which one party claimed to be the creative motivating force in the production of a copyrightable work into the ambit of that doctrine. With the substantial cutback of the work for hire doctrine under the 1976 Act, more cases of this genre can be expected to appear under the joint authorship rubric.

[18] The *Easter Seal Society* court stated that the work for hire claim made in that case would probably have failed on any view of the 1976 Act. The tapes there in question had been "commissioned as part of an audiovisual work within the meaning of § 101(2)," 815 F.2d 336; under § 101(2), such a work constitutes a work for hire only if the parties, in a signed writing, "expressly agree" to that designation. In this case, no such alternate ground of decision is available, and conflict with *Aldon Accessories* is unavoidable. Had we determined that the "sufficiently supervised and directed" test framed in that case correctly construed the 1976 Act, we would have affirmed the district court's judgment declaring Mitch Snyder, as trustee for CCNV, exclusive owner of copyright in the sculptural work "Third World America."

co-authorship of joint work with photographer). We do not instruct the final decision, however, so that Reid may have a full and fair opportunity to rebut CCNV's joint ownership claim and to pursue a question Reid has raised regarding the identity of potential joint authors.

Reid observes that CCNV engaged others to construct the pedestal and supply its components; he asserts that "the Court has insufficient information before it to determine whether CCNV is in fact the 'author' of the base." Reply Brief at 17. The possibility of joint authorship was not considered by the district court, and the record on contributions of participants other than Reid and CCNV is limited. We do know, not only that CCNV engaged others, but that Reid himself was "assisted at various times by a dozen different people, all paid by him, from funds. . . . provided by CCNV." 652 F.Supp. at 1455. It may well be that all other participants in the composition of "Third World America" were either (1) employees of Reid or CCNV within the applicable rules of agency law, *see Easter Seal Society*, 815 F.2d at 329 & n. 11, 335-36 & n. 20, and therefore subject to the work for hire doctrine, or (2) artisans carrying out specific orders, *i.e.*, workers who did not meet the "more than *de minimis*" standard of originality and creativity, *see supra* p. 1496, needed to qualify for authorship. We are not prepared to rule definitively on this issue, however. We therefore refer the matter to the district court with instructions to determine if there are any other parties who might qualify as "Third World America" authors and, on that account, should be joined in this action. *See* FED.R.CIV.P. 19; 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1614, at 140 (1972).

We address, finally, a peculiar feature of this case noted earlier, *see supra* note 4, one on which the parties' presentations are cloudy. There is only one "copy" of the copyrighted work at issue, and that only existing copy is exclusively owned by CCNV. Joint authors co-

owing copyright in a work "are deemed to be tenants in common," with "each having an independent right to use or license the copyright, subject only to a duty to account to the other co-owner for any profits earned thereby." W. PATRY, *supra*, at 116 (footnotes omitted). In the absence of an agreement specifying otherwise, any profits earned are to be divided equally, "even where it is clear that [the] respective contributions to the joint work are not equal." 1 M. NIMMER & D. NIMMER, *supra* note 8, § 6.08, at 6-20 (footnote omitted). But singular works of art, we recognize, do not fit comfortably into a scheme centrally concerned with reproduction of the underlying work. *See* BRENNER, *a Two-Phase Approach to Copyrighting the Fine Arts*, 24 BULL. COPYRIGHT SOC'Y 85, 85 (1976-77).

Reid, as we mentioned earlier, objected to CCNV's travel plans for "Third World America," and planned a more modest exhibition tour of his own. *See* 652 F.Supp. at 1456. Co-ownership (or even sole ownership) of the copyright does not appear to carry with it a right to stop or limit CCNV's tour or to gain possession of the unique work of art. *See* 17 U.S.C. § 109(a), (c). Snyder once invited Reid to have a "master mold" of the sculpture made at Reid's own expense. *See* 652 F.Supp. at 1456. We have so far come upon no current authority for a court to order renewal of that invitation. *But see Baker v. Libbie*, 210 Mass. 599, 606, 97 N.E. 109, 111-12 (1912) (writer of letter retains copyright; but recipient or present possessor has right to destroy letter itself; yet ownership of copyright "involves a right to copy or secure copies[,] [o]therwise, the author's right of publication might be lost").

If CCNV reproduces "Third World America" in any medium and profits thereby, however, an accounting would be due to Reid as a copyright owner. Independent of Reid's ownership of the copyright, CCNV might be obliged to credit Reid as an author of the sculpture. *Cf.*

Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981); *Dodd v. Fort Smith Special School Dist. No. 100*, 666 F.Supp. 1278, 1284-85 (W.D. Ark. 1987); *Follett v. Arbor House Publishing Co.*, 497 F.Supp. 304, 311 (S.D.N.Y. 1980) (all three decisions concern correction under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1982), in attribution of authorship or representation of a creator's role). Furthermore, Reid, as an author, may have rights against CCNV should it publish an excessively mutilated or altered version of "Third World America." *See Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976); Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L.REV. 1, 17-34 (1985) (discussing various common law and statutory doctrines available to protect a creator against publication of excessively mutilated versions of his work but not against destruction); Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, *reprinted in* 10 COLUM.-VLA J. LAW & ARTS 513, 547-57 (1986) (current protection of moral right under U.S. common law doctrines and statutes sufficient to meet moral rights requirements of Article 6*bis* of Berne Convention for the Protection of Literary and Artistic Works).

CONCLUSION

For the reasons stated, we conclude that the district court incorrectly held the work for hire doctrine applicable to the dispute between Reid and CCNV over copyright in the sculptural work "Third World America." We therefore reverse the judgment from which this appeal has been taken and remand the case for further proceedings consistent with this opinion, particularly, for comprehensive consideration whether the sculpture called "Third World America" is a joint work and, if it is, for determination of the owners of copyright in the work.

It is so ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 86-1507

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Plaintiffs,

v.

JAMES EARL REID, *et al.*,
Defendants.

Feb. 9, 1987

Timothy D. Junkin, Washington, D.C., for plaintiffs.

William Zinman, Baltimore, Md., for defendants.

DECISION AND ORDER

JACKSON, District Judge.

Plaintiffs Community for Creative Non-Violence ("CCNV"), a Washington-based non-profit unincorporated association of persons committed to the causes of the homeless people of America, and its agent, Mitch Snyder, sue James Earl Reid, a Baltimore sculptor and his photographer colleague, Ronald Purtee, for relief under the Copyright Act of 1976, 17 U.S.C. §§ 101-702 (the "Act"), to determine and enforce their rights with respect to a statute sculpted by Reid pursuant to an oral agreement with Snyder in the fall of 1985.[1] Specifically,

[1] Although named as a defendant, Purtee has not appeared, and has made no claim to any interest in the statute, in this case.

CCNV and Snyder pray that they be declared the owners of the copyright, and that Reid (and anyone else claiming with him) be permanently enjoined from infringing upon that copyright in any manner.[2] Upon the following facts, as found by the Court in accordance with Fed. R. Civ. P. 52(a) upon trial without a jury, the Court concludes, for the reasons stated, that judgment must be given for plaintiffs and the relief prayed, in substance, be granted.

I.

In late September or early October, 1985, at a friend's suggestion, Snyder determined that CCNV would sponsor a display at the forthcoming national Christmastime Pageant of Peace on the Ellipse in Washington, D.C., to dramatize the plight of the nation's homeless. Snyder and fellow CCNV members conceived the idea for the nature of the display: a sculpture of a modern Nativity scene in which, in lieu of the traditional Holy Family, the two adult figures and the infant would appear as contemporary homeless people huddled on a streetside steam grate. The family was to be black (most of the homeless in Washington being black); the figures were to be life-sized, and the steam grate would be positioned atop a platform "pedestal," or base, within which special-effects equipment would be enclosed to emit simulated "steam" through the grid to swirl about the figures. They also settled upon a title for the work—"Third World America"—and a legend for the pedestal: "and still there is no room at the inn."

Snyder then made inquiries to locate an artist to do the work and was referred by a mutual artist-acquaintance in Massachusetts to James Earl Reid. The agreement between Snyder and Reid was reached in the course of two telephone calls in October, 1985. Reid, enthusiastic from the outset about the project, at first

[2] Plaintiffs' claims for statutory damages and attorneys' fees were withdrawn at trial.

proposed that the work be cast in bronze, at a total cost approaching $100,000 or more, and taking six to eight months to complete. Told by Snyder that CCNV did not have such a sum to spend, and that the statute had to be completed by December 12th to be included in the Pageant of Peace, Reid suggested an alternative material known as "Design Cast 62," a synthetic substance with which he could work more quickly and would cost substantially less. Reid assured Snyder that Design Cast 62 was sufficiently durable to withstand the elements—"as strong as concrete," according to Snyder—and could be tinted to resemble bronze. Snyder agreed to the use of Design Cast 62. Reid then estimated the cost to $12,000 to "no more than" $15,000, not including his services which he offered to donate, and Snyder assented to the price. Reid then promised to endeavor to meet the deadline, and the bargain was complete. Neither party mentioned copyright.[3]

Reid commenced work immediately, making sketches of individual figures in possible poses, and CCNV members made plans for an art auction to raise funds by selling works donated by other artists in sympathy with their cause. About November 1st CCNV paid Reid an advance of $3,000 and Reid sent CCNV a sketch of a proposed arrangement of the figures showing the family in a "classic" creche-like relationship to one another: the mother seated (as if on a chair, although the object

[3] Reid testified that he imposed two other conditions which Snyder expressly accepted: that he would "reserve his full copyright rights" in the work, and retain "total [artistic] control." The Court finds otherwise. Not only is the testimony without any corroboration, but the conditions themselves are inconsistent with the tenor of the enterprise. Neither Reid nor Snyder were thinking of the venture in profit-making terms at the time (although Snyder had some thoughts about the statue's fundraising potential in the future), and Snyder and CCNV had specific ideas about the sculpture's ultimate appearance which they would have been unwilling to surrender to someone else's "control," even the artist's.

is not shown), cradling the infant in her lap, and the father standing behind her, bending over her right shoulder to touch the infant's foot with his right hand.[4]

Shortly thereafter Reid asked Snyder if he knew of a black family who could pose as models, and Snyder promptly suggested a family living at CCNV's Washington shelter whose baby had recently been born there, inviting Reid to visit them and decide for himself. Reid did so, and rejected the adults, whose appearances he found inappropriate, but accepted the child. (He ultimately used Mr. Purtee and a female acquaintance as his adult models.) While in Washington Snyder took Reid on a brief tour of nearby steam grates to observe homeless people in their habitat, pointing out to him that they were wont to recline, rather than sit or stand, on the grates to warm their entire bodies, and from that time all Reid's representations of the proposed statute contemplated recumbent figures only.[5]

Throughout November and the first two weeks of December Reid worked long hours exclusively on the statue, assisted at various times by a dozen different people, all paid by him, from funds, however, provided by CCNV. (It is undisputed that CCNV paid Reid the full price of $15,000). From the time of his construction of the arma-

[4] Reid says Snyder asked for the sketch for "fundraising" purposes. Snyder says it was also for his "approval," which Reid denies.

[5] Reid says that he had always known that people lie on steam grates, and had planned the statue that way himself. His preliminary sketch suggests, and the Court finds, otherwise.

Reid also says it was his idea to use the shopping cart as the repository for the family's personal belongings, as it appears in the completed statue, but four CCNV witnesses (including the artist from Massachusetts who worked as Reid's assistant throughout) testified, and the Court again finds, that Reid at first favored "suitcases" or "shopping bags," but was persuaded by Snyder and CCNV members to use a shopping cart as an accessory more typical of the homeless.

ture through the final clay rendering he was visited on a number of occasions by various CCNV members, ostensibly to check on his progress and to coordinate CCNV's construction of the base or pedestal. (In the meantime CCNV had ordered the special-effects equipment from sources in Hollywood at a cost of $7,000-$8,000.) On no occasion was the subject of copyright mentioned.

The clay model was ready for casting on or about December 12th, but the mold not yet made, when Snyder telephoned Reid to demand that the statue be delivered immediately or it would be excluded from the Pageant of Peace.[6] Reid replied that it simply could not be done, and was then told by Snyder to take the time necessary to permit him to deliver a "first class work." He did so, and delivered the finished "Third World America" to the Ellipse himself on December 24, 1985, receiving a final payment of $3,000 from Snyder.[7]

The statue remained on display near the Ellipse for a month. In late January, 1986, CCNV members returned the statue to Reid's studio in Baltimore for repair of some minor damage done in its transit to the Ellipse. In mid-February, Snyder began making plans to take the statue on a tour of several cities and exhibit it at major galleries to raise money for the homeless. Reid came to Washington, accompanied by a lawyer, to protest that the Design Cast 62 material was not strong enough to withstand the rigors of travel and to urge CCNV to have the

[6] In fact, the statue was rejected by Pageant officials, who declined for policy reasons to accept any display with what might be regarded as a political message, and was eventually exhibited at a nearby site.

[7] Immediately beneath the title on the finished work, which appears in raised letters on the box in which the baby lies, Reid inscribed the letter "C," encircled, and his name, to indicate his claim to a copyright for it, a claim the Court finds to have been made for the first time on December 24th.

statue cast in bronze for about $35,000, or at least to have a "master mold" made, at a cost of $5,000, to permit a duplicate to be cast if the original were irreparably damaged. Snyder declined to expend any more of CCNV's money on the project, but invited Reid to do spend his own if he wished. Several weeks later Synder called Reid to demand return of the statute, following which, without returning it, Reid filed a Certificate of Copyright Registration for it in his name with the Copyright Office, Library of Congress, on March 20, 1986, and announced plans for a more modest exhibition tour of his own for the statue.[6] This lawsuit ensued on June 2, 1986, in connection with which plaintiffs sought and obtained a preliminary injunction restoring the statue to their possession.

II.

The Copyright Act declares that "[c]opyright in a work . . . vests initially in the author or authors," 17 U.S.C. § 201(a), and, "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . [and] owns all of the rights comprised in the copyright" unless otherwise expressly agreed in writing. *Id.* § 201(b). A copyright can be conveyed, *id.*, § 201(d), but only in writing, *id.*, § 204(a), and in this case there is neither an agreement in writing between the parties as to ownership of the copyright in "Third World America," nor a unilateral instrument in writing purporting to convey it. Consequently, ownership of the copyright turns upon the identity of the statutory "author," which, in turn, depends upon whether the statue is a "work made for hire."

A "work made for hire" is defined, for purposes of this case, as "a work prepared by an employee within the scope of his or her employment. . . . ," *id.*, § 101, but for

[6] Snyder also registered a copyright, in his own name, on May 21st.

statutory copyright purposes generally, the employment relationship giving rise to a copyright is somewhat more expansive than the master-servant relationship found in the common law of agency. Under the Act one may be an employee "regardless of whether he is paid on the basis of a conventional periodic salary, on a piece work basis, on a fee or royalty basis, or even if [he works] as an accommodation with no compensation at all." 1 Nimmer on Copyright, § 5:03[B][1][a](1985). If the putative "employer" was either the "motivating factor" in the production of the work, or possessed the right to "direct and supervise" the manner in which the work was done, the copyright is his no matter the degree of creative license actually exercised by the artist-employee. *Id.*; *Murray v. Gelderman*, 566 F.2d 1307, 1310-11 (5th Cir. 1978); *see also Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 387, 83 L.Ed.2d 321 (1984); *Town of Clarkstown v. Reeder*, 566 F.Supp. 137, 141-42 (S.D.N.Y. 1983).

It is indisputable on this record that plaintiff CCNV was the motivating factor in the procreation of "Third World America." Snyder and his colleagues not only conceived the idea of a contemporary Nativity scene to contrast with the national celebration of the season, they did so in starkly specific detail. They then engaged Reid to utilize his representational skills, rather than his original artistic vision, to execute it. And while much was undoubtedly left to his discretion in doing so, CCNV nevertheless directed enough of his effort to assure that, in the end, he had produced what they, not he, wanted, notwithstanding his creative instincts may have been in harmony with theirs. Finally, they paid in full for the work, making their final payment only when satisfied, upon delivery, that the statute did, indeed, convey the message they had intended for it.

Reid could have bargained with CCNV for the copyright but did not do so. Consequently he will have to content himself with the considerable acclaim the statue has and will receive, and the public's recognition of him as the talented artist who executed it. But in the absence of a writing to the contrary, the law leaves no doubt that "Third World America" is a work made for hire, and CCNV the exclusive owner of the copyright therein.

For the foregoing reasons, therefore, it is, this 9th day of February, 1987,

ORDERED, that judgment be entered for plaintiffs; and it is

FURTHER ADJUDGED and DECLARED, that the copyright in and to that work of sculpture known as "Third World America" is vested exclusively in Mitch Snyder, trustee, for the use and benefit of the Community for Creative Non-Violence, a voluntary unincorporated association; and it is

FURTHER ORDERED, that Certificate of Copyright Registration for "Third World America" No. VAU 90-127 of March 20, 1986, in the name of James Earl Reid is declared null and void, and is cancelled; and it is

FURTHER ORDERED, that defendants James Earl Reid and Ronald Purtee, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are permanently enjoined from exercising, or attempting to exercise, any of those rights enumerated in 17 U.S.C. § 106 with respect to the work of sculpture known as "Third World America," except as otherwise provided in 17 U.S.C. §§ 107-18.

RESTATEMENT (SECOND) OF AGENCY (1958)

§ 220. Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Supreme Court, U.S.
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No. 88-293

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE,
Petitioner,

v.

JAMES EARL REID,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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October 17, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Are the terms "employer" and "employee" as found in the work-for-hire section of the United States Copyright Act of 1976, 17 U.S.C. § 101(1), to be interpreted in their traditional agency sense or to be applied in a manner unique to the Copyright Law where the exercising of limited control and providing a degree of direction transforms independent contractors into employees and their creations into works-for-hire?

RULE 28.1 LIST OF PARTIES

See Petition at ii.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-293

COMMUNITY FOR CREATIVE NON-VIOLENCE,
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JAMES EARL REID,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, James Earl Reid respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed herein by Community For Creative Non-Violence.

STATEMENT OF THE CASE

Respondent believes that while Petitioner's Statement of Facts is not inaccurate, it colors the facts in a manner as to make it unacceptable to Respondent. Respondent believes that the Statement of Facts as set forth in the opinion of the U.S. Court of Appeals for The District of Columbia in its decision in this matter is accurate and adopts it as its own.

SUMMARY OF ARGUMENT

The Court should exercise judicial restraint in order to allow either Congress to clarify the statutory am-

biguity in the use of the terms of employer and employee as defined in the work-for-hire section of the United States Copyright Act of 1976. 17 U.S.C. 101(1) or to allow the Federal Circuit Courts to continue to address the issue to permit the formation of a consensus on which of the two prevailing standards should be accepted.

ARGUMENT

I. Introduction

Respondent does not take issue with Petitioner or the Amicus Curiae, The Coalition for Copyright Justice, insofar as they allege that there is a conflict between the Circuits. The Fifth Circuit in its decision in *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises, Inc.*, 815 F.2d 323 (5th Cir. 1987) *cert. denied*, 108 S. Ct. 1280 (1988) ("Easter Seal") and the District of Columbia Circuit in this action, *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988), *petition for Cert. filed*, No. 88-293 (Aug. 17, 1988) ("CCNV") are apparently in conflict with the Second Circuit holdings in *Aldon Accessorie, Ltd v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.) *cert. denied*, 469 S.Ct. 387 (1984) ("Aldon") and the Seventh Circuit's decision in *Evans Newton Inc. v. Chicago Sys. Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 107 S. Ct. 434 (1986) ("Evans Newton").

Moreover, Respondent does not dispute contention that the underlying issue is a Federal question as it deals with the interpretation of the United States Copyright Act of 1976, 17 U.S.C.A. 101(1).

Finally, Respondent agrees with the proposition that the determination of the question, "under what circumstances will an independent contractor be found to be an employee for copyright/work-for-hire purposes" is an important one which affects a multitude of concerned parties.

Notwithstanding these areas of agreement, Respondent respectfully disagrees with the conclusion that Petitioner

and the Amicus Curiae draw from these facts, that the Court should grant of Writ of certiorari. Respondent believes that the Court should exercise judicial restraint and requests the Court to find that this matter is not yet appropriate to be before the Court for the reasons that the conflict is not as complete as it appears at first blush and, further, the statutory ambiguities would be better resolved by Congress.

II. Congress Should Determine The Correct Interpretation.

The pivotal issue which was addressed by the court below is the proper definition of an employee as it applies to "works-made-for-hire" which is set out in Section 101(1) of the Copyright Act of 1976.[1] A clear divergence of opinion as to the definition of employer/employee has developed. There are presently two[2] different views being used by the courts:

a) The Aldon/Evans Newton standard of "sufficiently supervised and directed" was developed first in the Second Circuit case of *Aldon Accessories Ltd. v. Spiegel, Inc., supra.* The Second Circuit concluded that the 1976 Act intended to make a modest alteration to the interpretation of "work-for-hire" doctrine by correcting the situation where the artist did all the creative work and the commissioning party did little or nothing. Under the *Aldon* interpretation, authorship is decided by examining the amount and sufficiency of the control as well as the degree of supervision of the work by the commissioning party. If the requisite control and supervision are found, then the commissioning party is deemed the author

[1] 17 U.S.C.A. § 101, A "work made for hire" is

(1) a work prepared 'by an employee within the scope of his or her employment; or . . .'

[2] A third test known as the "conservative test" was enunciated in *Peregrine v. Lauren Corp.*, 601 F. Supp. 828 (D. Colo. 1985). This approach has attracted no support and has not been followed by any other court.

and sole owner of the copyright. Section 101(2) of the Copyright Act enumerates nine specific independent contractor "works-for-hire" categories and applies to situations where the requisite control and supervision is lacking. In those situations the independent contractor is the sole author and copyright owner *unless* the parties sign a written instrument;

b) The literal approach uses traditional agency law to make the initial determination of whether the seller is an employee or an independent contractor. This approach is followed in *Easter Seal*, *supra*, and *CCNV*, *supra*, which found this approach to be most consistent with the language, history and policies of the 1976 Act. If the seller is found to be an employee, then 17 U.S.C.A. § 101(1) applies. 17 U.S.C.A. § 101(2) applies to independent contractors and their works which are generally not a "work-for-hire" *unless* (1) the work comes within one of the nine narrow statutory exceptions and (2) the parties agree in a signed instrument.

In light of this clear divergence, the issues become whether the dispute is best resolved at this time in this Court by granting the Writ of Certiorari or whether the Court should allow time for Congress to make legislative changes to the Act. Respondent believes that the Court should deny certiorari in favor of Congressional resolution.

Currently, before the Congress is a bill introduced by Senator Chad Cochran (D-Miss.) which will directly address the issues set forth in this case.[3] It sets out the

[3] "S.1223 To amend the copyright law regarding work made for hire . . . (1) by amending the definition, 'work made for hire'—

(A) in clause (1) by inserting before the semicolon the following: 'if the employee receives all employment benefits due under applicable State and Federal law the employer withnolds taxes from such payments to the employee and remits such taxes to the Internal Revenue Service';".

The full Bill is reproduced in the Appendix ("App.") hereto at App. 1a-4a.

definition of "employment," "scope of employment," and "work specially ordered or commissioned". The statutory ambiguities which have resulted in a division of judicial opinion are cleared up by adopting the traditional common law defintion of employer and employee (the "literal interpretation"). Its adoption would resolve the conflicts between the jurisdictions.

This matter is not a question of constitutional law which, of course, would be appropriately resolved by the Supreme Court, but rather is a conflict over the meaning of an ambiguous statutory provision. It is more efficient and appropriate to have Congress make the necessary choice between the alternative interpretations of legislative intent. The Court has spoken on several occasions as to the desirability of letting Congress act in similar matters.[4] Sen. Cochran plans to reintroduce this legislation in the next Congress and has received assurances from the Chairman of the Sub-Committee on Patents, Copyrights, and Trademarks that hearings will be held on the bill in the upcoming Congress.[5] With the legislative process activated and squarely addressing the issue

[4] "If a change is to be made in a statute, Congress, and not the Court, is the one to do it." *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 71 S. Ct. 971 (1951). "It is for Congress, not the United States Supreme Court, to rewrite a federal statute." *Blount v. Rizzi*, 400 U.S. 410, 91 S. Ct. 423 (1971). "If Congress is displeased with the decisions of this Court and the Court of Appeals, it may promptly reverse them by revising the relevant statutes. If that is its view, it no doubt would have acted more promptly if we had simply denied certiorari. Note 3. In fact, Congress declined to clarify its intention . . . in part because of concerns by some of its Members that such legislative action would be inappropriate while these cases were still pending in the federal courts." *Watt v. Alaska*, 451 U.S. 259, 101 S. Ct. 1673 (1981).

[5] See, 134 Cong. Rec. S14562-3 (App. 19a-20a) (daily ed. October 5, 1988) (statement of Sen. Cochran, Sen. Leahy and Sen. DeConcini) The comments and accompanying discussions are reproduced in the Appendix hereto at App. 5a-20a.

before the Court, Congress should be allowed to complete its task without preemption.

III. The Issue Should Remain In The Lower Courts for Further Amplification.

Even if Congress is not in a posture to resolve the conflict, the Supreme Court should deny Petitioner's Writ for Certiorari in order to allow the Federal Circuits time to address the statutory meaning of the words "employer" and "employee" as found in the Copyright Act. The additional time provided to the Federal courts may well allow a consensus to be formed around one of the two leading interpretations and eliminate the conflict. Resolution below would alleviate the need for this Court to rule on the matter.

The appellate opinions are quite distinct as they fashion two mutually exclusive rules. The two early appellant cases *Aldon*, *supra*, and *Evans Newton*, *supra*, cases adopted an approach which has unpredictability built in as an intimal ingredient. The decisions were premised on a rule which requires the examination of the input of the commissioning party at the conclusion of the work's creation thus leaving the identity of each and every commission's copyright owner unknown until the completion of the project. At that point the determination is a subjective one based on each party's view of the value and extent of its own contribution. The inevitable differences of opinion as to the worth of each party's contribution will invite litigation in hundreds of cases which will be thrust into the federal judicial system. There judges and juries will repeatedly have the difficult task of making factual determinations after reviewing and evaluating the most subjective of all areas, the creative process.

The more recent cases, *Easter Seal*, *supra*, and the case before the Court, *CCNV*, *supra*, have adopted the "literal interpretation test" [6] a standard which unlike

[6] *Easter Seal*, supra, at 329 and *CCNV*, supra, at 1494.

the Aldon test is workable in any situation. Perhaps the basis for the different approaches lies in the different origins of the underlying disputes. Unlike the situation in the *Aldon* and *Evans Newton* cases, in the literal interpretation test cases there were no copyright infringers forcing the courts to fashion case specific standards. In the *Easter Seal* case, there was a lending of stock film footage between friends done in good faith with no intent to harm or defraud nor was there any pecuniary gain ever claimed by the alleged infringing party.[7] In the case at hand, the matter of ownership in copyright is before the Court on declaratory judgment with no infringement alleged.[8]

With the literal interpretation standard, certainty is once again injected into the process of commissioning creative works. The determination of copyright ownership is simple. If one is a traditional employee, the employer is the author, otherwise it is the creator. If the parties wish to provide for a different arrangement they are free to contract accordingly.

The fact that there is an apparent conflict between appellate circuits on a federal question does not automatically give rise to the granting of a writ of certiorari. Rule 17 of the Rules of the Supreme Court [9] which outlines the criteria for granting certiorari quite clearly states that these are guidelines and that they are discretionary.[10]

[7] *Eastern Seal*, supra, at 324.

[8] *CCNV*, supra, at 1488.

[9] See Supreme Court Rule 17, "Considerations Governing Review on Certiorari" which in pertinent part states, "1. A review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following *while neither controlling nor fully measuring the Court's discretion indicate the character of reasons that will be considered . . .*" (emphasis added).

[10] *Moore's Federal Practice*, at SC 17-1 et seq., Par. 817.01 et seq. (1985).

The circuits now have clear options in how to analyze and rule on "work-for-hire" cases. Respondent believes that a clear pattern will emerge once the circuits which have not yet ruled on this question do so now that there are well reasoned judicially sound and viable alternatives to the Aldon/Evans Newton rule. Accordingly, we urge the Court to restrain from granting Petitioner its Writ at this time.

IV. The U.S. Court Of Appeals For The District Of Columbia Was Correct.

The Petitioner argues the merits of this case at length in its petition. Respondent does not believe his Opposition to the Petition for a Writ of Certiorari is the appropriate pleading in which to assert his various arguments and positions on the merits. He believes that the U.S. Court of Appeals for the District of Columbia was correct in its decision as to the interpretation of 17 U.S.C. § 101(1). If the Court ultimately decides to hear this case Respondent, of course, would then argue the merits of the case and the correctness of the decision of the U.S. Court of Appeals for the District of Columbia.

CONCLUSION

Respondent is simply proposing that this is not the time for the Court to be hearing this matter. Congress should be allowed the opportunity to resolve its own statutory ambiguity now that it is clear that there is confusion as to its original intent. The circuits can coalesce around one of the two divergent theories and thus eliminate the conflict and the need to utilize the limited resources of this Court. If the issue is not resolved in one of the appropriate forums, either through Congressional action or by agreement of the circuits, this Court will have adequate opportunity in the future to resolve the conflict.

As Justice Stone, in a related matter, most eloquently stated, ". . . the only check upon our own exercise of power is our own sense of self-restraint." [11]

Respectfully submitted,

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October 17, 1988

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[11] *United States v. Butler*, 297 U.S. 1, 80 L. Ed. 477, 56 S. Ct. 312, 325 (1936) (Stone, J., dissenting).

APPENDIX

APPENDIX

100TH CONGRESS
1ST SESSION

S. 1223

To amend the copyright law regarding
work made for hire.

IN THE SENATE OF THE UNITED STATES

MAY 19 (legislative day, MAY 13), 1987

Mr. COCHRAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the copyright law regarding
work made for hire.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 101 of title 17, United States Code, is amended—

(1) by amending the definition, "work made for hire"—

(A) in clause (1) by inserting before the semicolon the following: "if the employee receives all employment benefits due under applicable State and Federal law and the employer withholds taxes from such payments to the employee and remits such taxes to the Internal Revenue Service";

(B) by amending clause (2) to read as follows:

"(2) a work specially ordered or commissioned for use as a part of a motion picture, if for each such work the parties expressly agree in a separate written instrument signed by them prior to the commencement of any work pursuant to such an order or commission that the work shall be considered a work made for hire."; and

(C) by adding at the end thereof the following: "Unless the work falls within either clause (1) or clause (2), it cannot be work made for hire.";

(2) by adding at the end of the definition of "joint work" the following: "For a specially ordered or commissioned work to be a joint work, the work must meet the foregoing definition and for each such work the parties must expressly agree in a separate written instrument signed by them prior to the commencement of any work that the work shall be considered a joint work.".

SEC. 2. Section 201(c) of title 17, United States Code, is amended to read as follows:

"(c) CONTRIBUTIONS TO COLLECTIVE WORKS, CONTRIBUTIONS TO COMPILATIONS, SUPPLEMENTARY WORKS, INSTRUCTIONAL TEXTS, AND PARTS OF AUDIOVISUAL WORKS OTHER THAN MOTION PICTURES.—Copyright in each separate contribution to a collective work, or to a compilation, or to any instructional text; in any supplementary work; and in any part of an audiovisual work other than a motion picture, is distinct from the copyright in the larger work as a whole, and vests initially with the author who created the work which is to be incorporated into the larger work. In the absence of an express transfer of the copyright or of any rights under it, the owner of the copyright in such larger work is presumed to have

acquired only the privilege of reproducing and distributing the author's work as part of such particular larger work, any revision of such larger work, and any later larger work in the same series. If an express transfer is made with respect to an author's work in one of these categories, such transfer shall not exceed the rights which the transferee reasonably anticipates exercising. For purposes of this subsection—

"(1) an 'instrumental text' means a literary, pictorial, or graphic work prepared for publicaiton and with the purpose of use in systematic instructional activities; and

"(2) a 'supplementary work' is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forwards, afterwards, pictorial illustrations, or appendixes.".

SEC. 3. Section 202 of title 17, United States Code, is amended by striking out all after the semicolon in the second sentence and inserting in lieu thereof the following: "nor, in the absence of a written agreement expressly conveying property rights in a material object, does transfer of ownership of a copyright or of any exclusive rights under a copyright or the entering into of a work made for hire agreement pursuant to clause (2) of the definition of work made for hire, convey property rights in any material object.".

SEC. 4. Section 203(a)(3) of title 17, United States Code, is amended by inserting at the end thereof the following: "As to categories of works covered by section 201(c), a partial termination may be effected at any time during a period of five years beginning at the end of the period of three years after the date of the execution of the grant. The termination shall apply to any

usage permitted under the grant which has not been exercised by publication, except that any title published within such three-year period may be republished in its original form or in a revised version of that particular title. For purposes of this paragraph, a title shall be deemed revised if in its new form two-thirds of the content is retained from the origial version. Neither the effectuation of such a partial termination nor the failure to effect such a partial termination shall in any way restrict the effectuation of a complete termination of any grant pursuant to this paragraph.".

EXCERPTS FROM
CONGRESSIONAL RECORD—SENATE

October 5, 1988

(Pages S14560-S14563)

* * * *

Mr. COCHRAN. Mr. President, I rise today to voice my concern about the failure of this legislation to address a fundamental issue affecting creators' rights under the Copyright Act.

S. 1301 does not make any changes in the "work made for hire" doctrine of the Federal copyright law. Under that doctrine, the rights of authorship and of copyright ownership vest not in the creator, but rather in his employer or in the party that commissions him. This doctrine is an exception to the basic copyright principle that the "author" and copyright owner of an original creation is the creator of that work.

The interpretation of the work for hire doctrine by the courts, and its operation in the marketplace where creative work is commissioned, have broadened its scope far beyond the original intent and purpose. The effect of that expansion has been to deprive artists and other creators of all the rights that the copyright laws were intended to provide them.

The Berne Convention itself does not mention the work for hire doctrine. But, the convention was intended to protect the authorship rights of creators. It requires member States to recognize the right to claim authorship and the right to object to certain acts that affect the integrity of the work or the reputation of the author.

While Berne seeks to protect the rights of "authors," it does not define that critical term. The absence of such a definition has provided the rationale for avoiding the work for hire issue on the ground that it is beyond the scope of Berne. Proponents of this approach also cite the divergence of Berne member nations in defining who

should be considered an author. Some nations recognize only natural persons as authors, while others allow corporate entities to assume that status.

This argument misses the point. The question is not whether the Berne Convention explicitly requires changes in our work for hire doctrine; it obviously does not. Instead, the question ought to be whether the rights proclaimed by Berne are protected by U.S. copyright law. In a very real and practical way, our current copyright statutes force artists into relinquishing many of their rights as a condition of being hired.

I have no quarrel with the view that the passage of this bill will enable U.S. copyright owners to better protect their intellectual property. But I believe that view is deficient to the extent that it neglects the need to encourage creativity at home. Work for hire is putting many creators out of business and is forcing many others to live at a subsistence level hardly conducive to the development of their creative talents. If the impact of work for hire is not addressed, the attractiveness and demand for works created in the United States will decline as the size and diversity of domestic creative talent diminishes.

Most important, enactment of Berne legislation without addressing the concerns of creators ignores the constituency that our copyright laws were designed to protect. No one has ever argued that our copyright laws were intended to reward investors or those with the resources to buy talent. Their purpose is to stimulate creativity and to strike a balance between creators' interests in exploiting their works and the public interest in using and enjoying them.

In short, the right to claim authorship of one's own works under the Berne Convention is an academic one if the legal and practical effects of our own copyright laws undermine that right.

The insufficiency of current U.S. copyright law to protect artists in the area of work for hire is similar to the problem of moral rights, which was discussed during

hearings on the Berne legislation both in the Senate and in the other body.

The concerns of creators over this issue are also based on the lack of protection for the integrity of an artist's work. Unlike the issue of work for hire, U.S. copyright law does not explicitly provide for moral rights. The committee has concluded that the entire body of U.S. law, including State law, case law, commor law and Federal trademark statutes, provides sufficient moral rights protection and that explicit treatment is unnecessary in order to meet Berne's minimum standards.

Other disagree with this view and believe that U.S. law should provide explicitly for moral rights protection in order to comply with the standards set by the Berne Convention. In addition to work for hire, this is another issue of fundamental importance to artists that should be addressed if we are to make our laws consistent with an international treaty for the protection of artists' rights.

The unfair and burdensome operation of work for hire agreements, and the court's expansive interpretation of the concept of "employee", have severely diminished the benefits to creators under the copyright laws. If a creator prepares a work made for hire, he or she is no longer the author, for copyright purposes. Rather, the Copyright Act vests initial copyright in that work in the employer or the commissioning party, who receives all future income that may be derived from any use of the work in any medium.

Under the work for hire arrangement, creators have no further relationship to their own creative output: they have no right to display it, to reproduce it, to distribute it, or to create other works based on it. Artists cannot even use works for hire in their own portfolios without the permission of the party that commissions them, and they cannot insist that they be identified as the author of their works.

Under current law, the client can change the art and use it again without limitation, without benefiting the true author. In addition to losing all these rights, the creator receives none of the normal employee benefits such as unemployment insurance, health insurance, sick pay, pension benefits, or disability. Nor are they provided with a workplace or materials.

The livelihoods of freelance artists, photographers, and writers depend on their ability to claim "authorship" for the pieces they produce. They build their reputation, and therefore their ability to attract clients, on the basis of past performance. Their careers succeed or fail by their skill and style in translating through heir own creative expression the ideas and messages society needs to disseminate.

The adverse effects of work for hire extend beyond creators to our society as a whole. In our system, the copyright laws are intended to foster dissemination of diverse ideas, and to facilitate conversion of those ideas into tangible form by providing incentives and rewards for creators. When those incentives and rewards are eroded as they are by work for hire, the public interest in the free flow of information is thereby diminished.

An example of a practical problem that arises from the vague and uncertain rights of artists is a case involving a photographer in Chicago. The photographer, Stan Malinowski, was commissioned to take photographs for a magazine, but no written agreement assigning copyright ownership in the photographs to the publisher was ever signed. Instead, a form work for hire agreement was stamped on the back of the checks issued to Malinowski after his work was completed, so that when he endorsed the checks he would also be agreeing to a work for hire arrangement.

To prevent Malinowski from crossing out this language, the back of the checks provided that any alteration of the work for hire legend would void the check. Malinowski struck out that legend anyway, and cashed

the checks. He then sued the publisher for copyright infringement, whereupon he was charged with fraud and racketeering for altering the checks. While the judge has dismissed these charges, Malinowski faces prolonged litigation over whether he should be considered an "employee" of the magazine, and over other work for hire questions.

The current definition of work for hire invites this sort of litigation, and it is by no means certain that artists will ultimately prevail. In fact, many creative artists since the 1976 Copyright Act went into effect have been on the losing end of work for hire cases, even when they operate as independent contractors and decline to sign work for hire agreements.

Most work for hire abuses never see the light of day in the courtroom. In 1982, at the only hearing ever held on work for hire legislation since enactment of the 1976 act, Robin Brickman, a Rhode Island illustrator and member of the Graphic Artists Guild, testified about another example of the destructive effect of work for hire on creators' careers and income.

Ms. Brickman had signed a work for hire contract with Doubleday to provide 28 drawings for use in the interior of a book. For a modest fee, she produced a series of drawings which the publisher found acceptable. In fact, the publisher liked the work so much that one of the drawings was altered and used as the front jacket for the book.

The illustrator received no additional payment for the use of her illustration on the jacket. Nor was she able to complain about the fact that the drawing had been altered. Nor would she have been able to complain if the publisher had chosen not to give her credit as the illustrator who did the art.

Why does not the creator simply refuse to sign the work for hire contract? Assignments are offered on a take-it-or-leave-it basis. If the artist, writer, or photog-

rapher asks for a limited transfer of rights, the publisher selects a different creator to do the assignment.

It is important to recognize that most independent artists, photographers, or writers working in highly competitive fields simply cannot negotiate effectively with corporate art buyers. Confronted with such superior bargaining power, most artists have no choice but to accept work for hire contracts. By cutting creators off from potential reuse fees and control of their work, work for hire makes it unlikely that their bargaining positions will be strengthened as their careers progress.

No creator is safe from work for hire abuses. A member of the American Society of Magazine Photographers who has been a professional photographer for 30 years relates an unfortunately typical example. In many of his advertising jobs, he is presented with work for hire language after the negotiations are completed and the work is underway. While this particular photographer refuses to give up all authorship and copyright rights under a work for hire arrangement, he has lost much of his business as a result. Even this well-established artist finds it difficult to survive when the prevailing industry practice is to insist upon work for hire agreements, or refuse to use any artist who declines that invitation.

To rectify the worst of these problems, I have prepared an amendment, which I will not call up, but which I will request be printed in the RECORD along with an explanatory statement. I believe this amendment, which is far less comprehensive than my bill, S. 1223, would ensure improved safeguards for artists' rights. I will not offer the amendment at this time because of the assurances given to me by the Senator from Vermont [MR. LEAHY], the manager of the bill, and the distinguished chairman of the Copyrights Subcommittee [MR. DECONCINI].

Mr. President, I ask unanimous consent that a copy of my amendment and the explanatory statement be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

PROPOSED AMENDMENT TO S. 1301

Sec. 4. Subject Matter and Scope of Copyrights.

Chapter 1 of title 17 of the United States Code is amended—

(1) in section 101—

(C) in subdivision (1) of the definition of "work made for hire" by adding at the end thereof the following: "only if the employee receives all employment benefits due under applicable State and Federal law, and the employer withholds taxes from the compensation paid to the employee and remits such taxes to the Internal Revenue Service."

(D) in subdivision (2) of the definition of "work made for hire"—

(1) by inserting between "atlas," and "if" the word "only"; and

(2) by inserting after "written instrument signed by them" the following: ", prior to commencement of any physical or intellectual effort related to the specially ordered or commissioned work."

(E) in the definition of "joint work," by adding the following sentence:

"For a specially ordered or commissioned work to be a joint work coowned by the specially ordering or commissioning party, the work must meet the foregoing definition, and for each such work all coowners must expressly agree in a separate written instrument, signed by them prior to the commencement of any physical or intellectual effort related to the work, that it shall be considered a joint work."

EXPLANATION OF PROPOSED AMENDMENT TO S. 1301

The proposed amendment to S. 1301 would make four changes to section 101 of the Copyright Act that are designed to improve the ability of independent creators to protect their authorship and copyright rights in their own works.

1. *Definition of "Employee" Under Subdivision (1) of Work Made For Hire Definition:*

In enacting a definition of "work made for hire" in the 1976 Copyright Act, Congress determined that any work prepared by an "employee" in the scope of his or her "employment" would be considered a work made for hire even without a written instrument so providing. 17 U.S.C. § 101 (subdivision (1) of the definition of "work made for hire"). While the legislative history of the 1976 Act strongly suggests that Congress intended the concept of employment to extend only to salaried employees.* Congress did not expressly define the term "employee" in the definition of work made for hire.

The lack of an express definition in the language of the statute has led to years of disagreement in the courts of appeals over the meaning of this key statutory term, and indeed over the proper interpretation of the significance of the 1976 revisions to the work made for hire doctrine. *Compare Community for Creative Non-Violence* v. *Reid*, No. 87-7051 (D.C. Cir. May 20, 1988), *and Easter Seal Society for Crippled Children and Adults of Louisiana, Inc.* v. *Playboy Enterprises*, 815 F.2d 323 (5th

* For example, the publishing industry acknowledged at the time an early version of the work for hire language was drafted that the concept of employment was intended to apply only to salaried employees: "Works for hire—in which copyright is by law owned by the employer—would be redefined to include only work done by a salaried employee in the scope of his regular duties. . . ." Statement of the American Book Publishers Council to the Register of Copyrights, November, 1963, W. Patry, *Latman's The Copyright Law* 120 n. 28 (6th ed. 1986).

Cir. 1987), *cert. denied*, 56 U.S.L.W. 3666 (Mar. 29, 1988), *with Aldon Accessories Ltd* v. *Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984), *Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987), *and Evans Newton Inc.* v. *Chicago Sys. Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 107 S. Ct. 434 (1986). Under one view adopted by the District of Columbia and Fifth Circuits, the determination whether a creator is an "employee" is guided by the rules of agency law set forth in the Restatement (Second) of Agency § 220 (1958). *See Reid*, slip op. at 19; *Easter Seal*, 815 F.2d at 335-36 n. 20. Under this view, if consideration of the Restatement factors leads to the conclusion that the creator of a commissioned work is not an "employee," the work cannot be a work made for hire unless it meets the criteria established in subdivision (2) of the definition of that term. That subdivision provides that a commissioned work qualifies as a work made for hire only if there is a written agreement so providing, and the work falls within one of nine enumerated categories of works. *See* 17 U.S.C. § 101 (subdivision (2) of definition of "work made for hire").

Under the approach embraced by the Second, Fourth and Seventh Circuits, and "employee" for work for hire purposes is determined by reference to principles developed under the 1909 Copyright Act, which posited that the right to supervise and direct the creator's work, together with the degree to which that right was actually exercised, were the guiding criteria. *Aldon*, 738 F.2d at 552. Thus, *Aldon* held that even independent contractors working on commission could be classified as "employees" if the court found that the requisite degree of supervision and control was exercised by the commissioning party over the creator's work.

The amendment's proposed definition of "employee" is intended to resolve the conflict in the courts by establishing two objective and yet flexible employment criteria.

First, no creator can be classified as an "employee" unless he receives "all employment benefits due under applicable State and Federal law." The amendment does not attempt to identify the employment benefits necessary to warrant a finding that a creator is an "employee" because State law varies with respect to the indicia of employment, and both State and Federal law on that issue will change over time. It is nevertheless anticipated that the categories of employment benefits for a true "employee" under amended clause (1) may include: (1) payment of a salary or other form of regular compensation; (2) payment of overhead expenses by the employer (*e.g.*, rent, utilities, support staff, office and material expenses); (3) availability of a regular workplace for the employee; (4) paid vacation and sick leave; (5) coverage under a health and disability insurance program if such a program has been established by the employer; (6) eligibility for pension benefits if the employer has established a pension plan for employees; (7) coverage under the federal social security system and the payment of obligations thereunder; (8) eligibility for unemployment insurance and payment of unemployment taxes by the employer; and (9) eligibility for workman's compensation benefits and payment of workman's compensation insurance premiums by the employer if required by law. The place of employment will determine which state law governs for purposes of ascertaining the applicable state employment benefits. If only some, but not all, of the applicable employment benefits are extended to the purported "employees," the works created by such person cannot be considered "made for hire" under amended clause (1) of the defintion.

Second, the employer must withhold taxes from the payments to the employee, and must remit those taxes to the IRS, in order for the creations of the purported employee to be considered works made for hire under clause (1). This requirement is intended to ensure that a creator is treated as an employee for copyright purposes only if the employer itself takes action through withholding which clearly shows that the employer considers the creator to be an employee. Although the statute refers to taxes without specifying their precise nature, only federal income taxes are subject to withholding and are then paid to the IRS. Thus, the reference to taxes in the bill is intended to refer only to federal income taxes.

It is important to note that both of the employment cirteria added by the proposed amendment must be satisfied in order to classify a creator as an "employee' under subdivision (1) of the work made for hire definition. Accordingly, it is not enough for the purported employee to receive all applicable employment benefits; the alleged employer must also withhold federal income taxes and remit them to the IRS in order for a work to be classified as an employee work made for hire. Conversely, it is not enough for the purported employer to withhold taxes and remit them to the IRS; the "employee" must also receive all applicable employment benefits in order to satisfy clause (1).

2. *Changes to Subdivision (2) of Definition of Work Made for Hire:*

The proposed amendment would make two changes to subdivision (2) of the work made for hire definition, which covers certain categories of specially ordered or commissioned works. First, the amendment would provide that the nine enumerated categories of commissioned works could qualify as works made for hire "only if the parties expressly agree in a written instrument signed by them. . . ." (emphasis on added word). The purpose of this amendment is to make absolutely clear that the nine categories of commissioned works set out in subdivision (2) cannot be works made for hire unless there is a written agreement to that effect. The amendment is intended to prevent courts from concluding that the commissioned works listed in subdivision (2) can still qual-

ify as "employee" works made for hire under subdivision (1) if the prerequisites of subdivision (2) are not satisfied. Thus, the proposed amendment provides that the subdivision (2) categories of works can be classified as works made for hire only if the writing requirement is met.

The second modification to subdivision (2) of the work made for hire definition builds upon the first. It would provide that in order for a commissioned work falling within one of the nine categories to be a work made for hire, the parties must not only agree in writing, they must do so "prior to commencement of any physical or intellectual effort related to the specially ordered or commissioned work. . . ." The purpose of this proposal is to prevent abusive practices of commissioning parties that undermine the protection that the writing requirement was intended to give creators. The objective of that requirement was to ensure that both parties, particularly the creator who most often finds himself in the weaker bargaining position, makes a reasoned and independent determination to enter into a work made for hire arrangement. Unfortunately, some commissioning parties have forced creators to sign work for hire agreements by proposing such an agreement after the work is well underway or is completed but before the creator has been paid. In these situations, the creator must sign the agreement in order to get paid, or else undertake expensive litigation. The most egregious of these practices consists of stamping form work for hire language on the back of a check which the creator must then endorse in order to get paid.

The proposed amendment would prevent this and any other after-the-fact use of work made for hire agreements. In order to be enforceable under the amendment, such an agreement must be negotiated and executed before any effort, physical or intellectual, is expended on the project. With the knowledge that commissioned work made for hire agreements meetings the standards of sub-

division (2) must be signed up front, the parties must decide at the outset of their relationship whether a work made for hire arrangement is desirable. At that stage, the creator retains his independence to decide whether such an agreement would be in his best interests. If the commissioning party desires to acquire all or some of the creator's copyright rights after the commencement of physical or intellectual effort on the project, it can do so only through an assignment agreement and not by a work made for hire contract. Any work made for hire contract signed after commencement of physical or intellectual effort would be void and unenforceable.

3. *Definition of Joint Work:*

Finally, the proposed amendment would change the definition of "joint work" in section 101 by establishing a new objective test for determining whether a specially ordered or commissioned work constitutes a joint work in which the co-authors own the copyright as tenants in common. As owners of the copyright, the co-authors of a joint work have an undivided interest in the work as a whole, and each co-author enjoys an independent right to exploit or license the copyright, as long as the co-author exercising that right accounts to the other co-author for the profits earned. *See Oddo* v. *Ries*, 743 F.2d 630, 633 (9th Cir. 1984); *Pye* v. *Mitchell*, 574 F.2d 476, 480 (9th Cir. 1978).

Under present law, the touchstone for determining whether a work is joint work is the intention of the parties. Section 101 currently provides that a "joint work" is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable a[s in a painting] or interdependent [as in a motion picture] parts of a unitary whole." 17 U.S.C. § 101 (definition of "joint work"). It is not enough merely for the parties to intend to create a joint work; each co-author must in fact make a genuine contribution to the creation of the joint work. *See Whelan Associates*,

Inc. v. *Jaslow Dental Laboratory, Inc.*, 609 F. Supp. 1307, 1318-19 (E.D. Pa. 1985), *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 877 (1987) (the "general assistance and contributions" to the project by the commissioning party did not make him the co-author of the work).

The bill proposes to supplement this "intention of the parties" test only with respect to specially ordered or commissioned works. Artists and other independent contractors have been faced with *post hoc* claims that works created on commission, for which no written agreement regarding copyright ownership or work made for hire status exists, are joint works because the parties somehow "intended" them to be such. The evidence of intent frequently is not probative one way or another, particularly when the claim of joint authorship arises after-the-fact. Indeed, commissioning parties have frequently asserted a "joint authorship" claim as a back-up defense in cases in which their primary assertion is that they are the sole owners under the work for hire doctrine. *See, e.g., Reid*, slip op. at 19-20; *Schmid Bros., Inc.* v. *W. Goebel Porzellanfabrik KG.*, 589 F. Supp. 497, 501 (E.D.N.Y. 1982) (ceramic figurines held to be joint works); *Mister B. Textiles, Inc.* v. *Woodcrest Fabrics, Inc.* 523 F. Supp. 21, 24-25 (S.D.N.Y. 1981) (fabric design held to a joint work).

To eliminate any possibility of nebulous or illusory after-the-fact claims of joint authorship of specially ordered or commissioned works, the amendment would change the definition of "joint work" to provide that the parties "must expressly agree in a separate written instrument, signed by them prior to the commencement of any physical or intellectual effort related to the work, that it shall be considered a joint work." Thus, the parties must still intend that their contributions "be merged into inseparable or interdependent parts of a unitary whole"; but in order for their work to be legally considered a joint work, they must memorialize that intention in a written instrument before the project begins.

If this proposal is adopted, the contributions to a commissioned work would not be merged into a joint work unless the writing requirement was satisfied. If that requirement was not complied with, the copyright in the contribution of each author would be owned by that author alone. Thus, if two or more contributing authors decided to enter into a joint work agreement after beginning work on the project, such an agreement would be void and unenforceable. The copyrights in their respective contributions would be separately owned by each individual author, much like copyright ownership is determined with respect to a contribution to a collective work. *See* 17 U.S.C. § 201(c) (copyright in each separate contribution to a collective work vests intitially in the author of the contribution).

Mr. COCHRAN. Mr. President, I would like to take a few moments to ask the cosponsors of the Berne bill, Senator LEAHY, and the chairman of the subcommittee responsible for copyright matters, Senator DECONCINI, a few questions concerning any work for hire bill, S. 1223.

First, I ask the distinguished Senator from Vermont whether he believes that Congress should take another look at the work for hire statutes and their impact on artists' rights?

Mr. LEAHY. I would support efforts by this subcommittee to look into this issue to determine if legislative action is necesary to provide proper guidance to the courts and to ensure that artists' rights are being protected in this area. We have not reviewed work for hire since October 1982, during the 97th Congress, and would undoubtedly benefit from another look at the issue.

While I am not convinced of the merits of all of the proposals contained in your bill, S. 1223, I believe it is a starting point for discussion and debate among the members of the Copyright Subcommittee.

Mr. COCHRAN. I appreciate the comments of the Senator from Vermont. Now, I would like to ask the

chairman of the Patents, Copyrights, and Trademarks Subcommittee whether he will bring this matter before the subcommittee in the next Congress?

Mr. DECONCINI. As I have informed my colleague from Mississippi, it was my intent to schedule a hearing on your work for hire bill during this Congress. Unfortunately, because of the lengthy Supreme Court confirmation process and consideration of the Berne Treaty and other parts of our agenda, it was not possible to do so.

If I am chairman of the subcommittee in the 101st Congress, I will schedule a hearing on work for hire legislation early in the first session. I have heard great concern voiced about work for hire arrangements throughout the creative industry, particularly from photographers, artists, and other freelance professional creators who work as independent contractors. I agree with my friends from Mississippi and Vermont that a full exploration of the issue is warranted. I therefore give the Senator from Mississippi my commitment to hold hearings on his work for hire bill promptly in the next Congress if it is in my authority to do so.

Mr. COCHRAN. I thank the chairman of the Copyrights Subcommittee and I look forward to working with you, along with other members of the subcommittee, toward the goal of enacting work for hire reform legislation next year.

Mr. President, I thank the distinguished Senators for their cooperation in assuring that this issue will receive attention in the early part of the next Congress and that we will get around to addressing this very important and unfair application of our copyright laws to independent artists.

Mr. President, may I inquire what the situation is with respect to the time on the bill?

The PRESIDING OFFICER. The Senator from Mississippi has 16½ minutes remaining.

Mr. COCHRAN. Mr. President, I reserve the remainder of my time.

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No. 88-293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Petitioners,

v.

JAMES EARL REID,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE COPYRIGHT JUSTICE COALITION AS AMICUS CURIAE

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August 19, 1988

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QUESTIONS PRESENTED

1. Whether a commissioned work created by an independent artist outside of the traditional employment relationship should be classified as a "work made for hire" under the 1976 Copyright Act, 17 U.S.C. § 101, where the parties did not agree in writing that the work should be considered to be "made for hire," and where the work does not fall within one of the nine categories of works enumerated in subdivision (2) of the definition of that term.

2. Whether Congress intended subdivision (2) of the definition of "work made for hire" in the 1976 Copyright Act, 17 U.S.C. § 101, to preempt the common law "direct and supervise" test formerly used to determine the work made for hire status of commissioned works under the 1909 Copyright Act, 17 U.S.C. § 26 (repealed 1976).

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BRIEF OF THE COPYRIGHT JUSTICE COALITION AS AMICUS CURIAE

The Copyright Justice Coalition (CJC) submits its brief *amicus curiae* in support of the petition for certiorari filed by the Community for Creative Non-Violence, *et al.* (CCNV) in this case. All parties have consented to the filing of this brief by the CJC, and their consent letters have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The CJC is an *ad hoc* group of 50 organizations whose over 100,000 members comprise a large segment of the community of independent creators in the United States.[1]

[1] The members of the CJC are listed in Appendix A to this brief.

On behalf of its members, the CJC participated as *amicus curiae* in support of the respondent in the court below. Counsel for CJC filed an extensive brief tracing the legislative history of the "work made for hire" doctrine,[2] and participated in the oral argument before the court. Although it argued for and agrees with the District of Columbia Circuit's resolution of the work for hire questions presented in this case, the CJC urges this Court to grant the petition for certiorari because of the overriding need to establish uniform rules governing the determination of authorship and copyright ownership under the United States copyright laws.

The CJC represents individual creators throughout the country whose artistic and financial livelihoods are profoundly affected by the work for hire rules of the Copyright Act of 1976. 17 U.S.C. §§ 101 *et seq.* Under those rules, the creators of copyrightable works are not treated as either authors or copyright owners of their own works and are divested of all copyright rights in those works. *Id.* § 201(b). Instead, the "author" and copyright owner of a work for hire is either (i) the employer of the creator who is hired as an "employee," or (ii) the party that commissioned the work when the parties have agreed in writing that it shall be considered "for hire", and the work falls within one of nine enumerated categories of commissioned works eligible for work for hire treatment under the statute. *Id.* § 101 (definition of "work made for hire").

The individual creators represented by the CJC have a strong and vital interest in confining the scope of this doctrine to the limits that Congress established. The membership of CJC organizations include free-lance photographers, artists, illustrators, writers, cartoonists, actors, and songwriters. They are not traditional em-

[2] For convenience, the statutory phrase "work made for hire" will hereafter be shortened to "work for hire."

ployees who receive a salary and other typical employment benefits such as insurance and paid vacation time. Instead, they produce photographs, graphic designs, illustrations, magazine articles, books, advertising materials, cartoons, musical compositions and other creative works "on commission," an arrangement whereby the creator is hired and paid by a commissioning party on a project-by-project basis to create a particular work for a specific purpose.

It is critically important for free-lance creators to be able to claim authorship of their own works in order to build a reputation that attracts new clients. Equally as important, free-lance creators rely heavily on the income-producing potential associated with ownership of the copyrights in their works. Copyright ownership ensures that the free-lance creator can sell, assign, or license his work, and can use that work as the basis for creating derivative works. Rights to the income derived from royalties that result from exploitation of the copyright in original and derivative works are an integral part of a free-lance creator's ability to sustain his business and to build even a minimal base of financial security.

Work for hire has wreaked havoc with creators' ability to establish and preserve any degree of financial stability. Creators' fundamental rights of authorship and copyright ownership have been usurped through the systematic use of work for hire arrangements covering commissioned works that are statutorily ineligible for work for hire treatment. Works of fine art such as sculpture and photographs taken for advertisements, for example, are not included in the categories of works enumerated in subsection (2) of the definition of "work made for hire" and thus cannot legally be the subject of a work for hire agreement. Yet the failure of many courts to recognize the exclusivity of the categories of commissioned works set forth in subdivision (2) of the definition has allowed commissioning parties to ignore this statutory limitation.

Furthermore, many CJC creators who refuse to sign work for hire agreements find themselves in the predicament that the respondent in this case experienced in district court. They face the prospect in many jurisdictions of being classified as "employees" under subsection (1) of the definition of work for hire. As statutory "employees," creators lose all authorship and copyright rights in their works as a matter of law, without any written agreement so providing, without the creators receiving any of the usual benefits of an employment relationship, and usually without any awareness by the parties that such a relationship exists.

The decision of the court below, together with that of the Fifth Circuit in *Easter Seal Society for Crippled Children v. Playboy Enterprises*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1280 (1988), protects free-lance creators from the confiscatory consequences of an overbroad work for hire doctrine. By confining the scope of that doctrine to the limits that Congress intended when it enacted the Copyright Act of 1976, *Easter Seal* and the decision below ruled that the fundamental purpose of that statute—to foster and encourage creativity—should not be eviscerated by an artificial presumption that the party commissioning a work is deemed the "employer" of an independent creator. Congress never envisioned that the statute would be read to disrupt and destroy the incentives for free-lance creators to exercise their talents. The protection offered by the District of Columbia and Fifth Circuits, however, is available only to the relatively few CJC creators who live and work in those jurisdictions. The majority of CJC members face the dilemma of either signing work for hire agreements, or being considered an "employee" for copyright purposes only. Unless that dilemma is resolved favorably for free-lance creators throughout the country, work for hire will dry up our national resources of free-lance creative talent.

SUMMARY OF ARGUMENT

This case presents issues of central importance to the fair administration of the United States copyright laws. The concept of work for hire has been a difficult and troubling one for Congress and courts alike throughout this century. Before the 1976 Act, no statutory definition of that concept existed. Absent statutory guidance, the courts gradually shaped a doctrine that divested free-lance creators working "on commission" of all authorship and copyright rights on the basis of a legal fiction that presumed the parties had intended that result. In the fifteen years that preceded enactment of the Copyright Act of 1976, the Copyright Office and representatives of creators' interests demonstrated the need for drastically limiting the applicability of that legal fiction. The result was a statutory definition of work for hire that established a dichotomy between two fundamentally different types of work—those created by traditional (i.e., salaried) employees, and those produced on commission by independent creators. The primary significance of the new definition with respect to commissioned works was that it restricted the applicability of the work for hire doctrine only to the circumstances explicitly authorized by the statute.

Despite these efforts, controversy over the proper interpretation of the work for hire doctrine has continued. A steady stream of confused and often conflicting decisions has emerged from the courts ever since the effective date of the 1976 Copyright Act. As the court below noted, commentators continue to express their concern about the chaotic state of the copyright law in this area and to voice nearly uniform disagreement with the decisions that fail to acknowledge the limitations on the applicability of work for hire imposed by Congress in 1976.

Against this background, the confusion and lack of predictability have caused substantial hardship for creators and users alike in determining authorship and copy-

right ownership in commissioned works. In the Second, Fourth, and Seventh Circuits, free-lance creators are considered "employees" for work for hire purposes if a sufficient degree of control is exercised by the commissioning party. *See Aldon Accessories Ltd. v. Spiegel*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984); *Evans Newton Inc. v. Chicago Systems Software*, 793 F.2d 889 (7th Cir.), 107 S.Ct. 434 (1986); *Brunswick Beacon v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987). Accordingly, the commissioned works of most free-lance creators in those jurisdictions are works for hire regardless of the type of work involved or the existence of a written agreement.

In contrast, free-lance creators in the District of Columbia and Fifth Circuits are not considered "employees" of the parties that commissioned them, and their works qualify as works for hire only if the statutory conditions set forth in subsection (2) of the definition of that term are satisfied. *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988), *petition for cert. filed*, No. 88-293 (Aug. 17, 1988); *Easter Seal Society for Crippled Children & Adults of Louisiana, Inc. v. Playboy Enterprises, supra.* Free-lance creators operating in other jurisdictions must await their circuit courts' decisions before they will know whether they will have a meaningful opportunity to avoid having all their works classified as works for hire under the "employee" prong of the statutory definition.

In three of these cases (*Aldon*, *Evans Newton* and *Easter Seal*), this Court has declined to resolve the conflict in the Circuits over the meaning of the 1976 revisions to the work for hire doctrine. In explaining why the *Easter Seal* case was not an appropriate vehicle for resolving the work for hire issue, the Solicitor General nonetheless acknowledged that "the issue on which the lower courts are divided is important and may in the future warrant resolution by [this] Court." Brief for

the United States as *Amicus Curiae* at 8, *Easter Seal* (No. 87-482). While prior cases may not have been appropriate for consideration by this Court, this case presents an ideal opportunity to settle the conflict.

First, unlike *Aldon* and *Easter Seal*, in which work for hire arose as an affirmative defense in the context of an infringement action, this case involves a dispute between the two primary players in the work for hire controversy: the commissioning party (CCNV) and the creator himself (Reid). Both parties claim authorship of and copyright ownership in the sculpture in dispute, and it is clear that CCNV's claim can succeed only if Reid is classified as an "employee" for copyright purposes. Reid's position, on the other hand, is that a commissioned work can qualify as a work for hire only if both statutory conditions set forth in subsection (2) of the definition are satisfied. Thus, this case squarely presents the fundamental questions that have divided the lower courts, in a case involving the parties whose interests are most directly affected by the work for hire controversy.

Second, the opinion of the court below makes unmistakably clear that its interpretation of the 1976 revisions to work for hire makes conflict with *Aldon Accessories* "unavoidable." *CCNV v. Reid*, 846 F.2d at 1497 n.18. This case thus presents the juxtaposition of two fundamentally different and irreconcilable interpretations of an important federal statute.

Finally, further delay in the resolution of this controversy will cause substantial harm to the creators who are the intended beneficiaries of the protections afforded by the copyright laws. Free-lance creators lack the resources to litigate work for hire questions repeatedly until an appropriate case is finally accepted for review by this Court. This case is exceptional not only because the artist's position was vindicated, but also because the artist had the resources to litigate the questions now

before this Court. Few, if any, free-lance creators can afford to sustain this sort of litigation. Thus, although confusion in the lower courts will continue, it is exceedingly unlikely that another work for hire case involving a creator as a party will come before this Court for many years. The CJC therefore urges the Court to take this opportunity to settle the work for hire controversy.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THIS CASE PRESENTS ISSUES OF NATIONAL IMPORTANCE FOR ALL PARTIES WHO CREATE OR USE COPYRIGHTABLE WORKS

A fundamental tenet of United States copyright law is that a creator of copyrightable work has the right to proclaim himself its author and to reap the benefits accorded the owner of the copyright in that work. *See* 17 U.S.C. § 106. Section 201 of the Copyright Act of 1976 thus provides that "[c]opyright in a work protected under this title vests initially in the author or authors of the work." *Id.* § 201(a). Congress has never defined the term "author" in the various revisions of the copyright laws that have been enacted since the first statute was passed in 1790. Act of May 31, 1790, Ch. 15, 1 Stat. 124. Despite the absence of an explicit statutory definition, the principle is well-established that the person who actually creates the work should normally be deemed its "author." *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (quoting with approval the definition of "author" as "he to whom anything owes its origin; origination; maker. . . .").

The work for hire concept is an exception to this general rule. The concept first emerged during the development of common law copyright and was codified for the first time in the 1909 Copyright Act. Act of March 4, 1909, § 26, Pub. L. No. 60-349, Ch. 320, 35 Stat. 1075. *See Colliery Eng. Co. v. United Corresp. Schools Co.*, 94 Fed. 152 (C.C.S.D.N.Y. 1899); *Little v. Gould*, 15 F.

Cas. 612 (C.C.N.D.N.Y. 1852). The key element of the concept always has been the use of a statutory presumption to elevate to the status of "author" someone other than the actual creator. The 1909 Act, for example, stated that the term "author . . . shall include an employer in the case of a work made for hire." 17 U.S.C. § 26 (repealed 1976). More recently, Congress provided in the 1976 Copyright Act that "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . ." *Id.* § 201(b). As author, such employer or other person "owns all of the rights comprised in the copyright . . . unless the parties expressly agree otherwise in a written instrument . . . ." *Id.* § 201(b).

Authorship and ownership of copyright under the 1976 Act thus turn on whether the work qualifies as a work for hire. If the work at issue is not a work for hire, its creator is considered the author and initial copyright owner. But if the creation is a work for hire, then the author and copyright owner is the employer or, if certain statutory conditions are satisfied, the party that commissioned the work. Where a commissioned work is involved, therefore, entitlement to the benefits of copyright ownership enumerated in § 106 of the 1976 Act depends upon how the work for hire question is resolved.

A large percentage of the copyrightable works produced in this country for commercial purposes are created by persons who are not traditional employees of the parties for whom the work is done.[3] Publishers and ad-

[3] A 1955 Copyright Office study revealed that approximately 40 percent of copyright registrations issued by the Copyright Office were for works for hire. *See* Hardy, "Copyright Law's Concept of Employment—What Congress Really Intended," 35 *J. Copyright Soc. U.S.A.* 210 (April 1988). The percentages of certain types of works registered as works for hire were even higher: 92 percent of motion picture registrations and 93.7 percent of periodical regis-

vertising agencies increasingly rely on specialized outside talent to produce highly sophisticated creative work that cannot be done in-house. Free-lance creators who carve out specialties in advertising photography or medical illustration are customarily paid a fee that compensates the creator only for the specific use contemplated by the commissioning party. Such compensation does not reflect the economic value of the work over the life of the copyright term, which is seventy-five years from the year of publication if the creation is a work for hire. 17 U.S.C. § 302(c). Nor is the compensation paid free-lance creators accompanied by employment benefits that may warrant foregoing the benefit of retaining copyright rights. In order to maintain economic viability, free-lance creators therefore rely heavily on their fundamental rights to claim authorship of and copyright ownership in the works they create. These intangible rights are the only valuable business assets that most free-lance creators have.

Under a work for hire arrangement, independent creators lose those rights. They cannot claim authorship of their works by reproducing them in their portfolios. They cannot require a commissioning party to acknowledge their authorship of a work for hire because the statutory "author" is the commissioning party and not the creator.[4] They cannot license others to use the work for

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trations were issued for works for hire. *Id.* n.2. Current statistics are not known because the Copyright Office does not keep records of the percentages of works registered on a "for hire" basis. However, the expanding reliance of users on outside talent to fulfill specific needs suggests that the percentage of works registered as works for hire is much greater today than it was over 30 years ago.

[4] As the court below acknowledged, there is a basis outside the Copyright Act for a creator to require that he be given authorship credit. *See CCNV v. Reid*, 846 F.2d at 1498, *citing Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981); *Dodd v. Fort Smith Special School Dist. No. 100*, 666 F. Supp. 1278, 1284-85 (W.D. Ark. 1987);

other non-competing purposes because the statute vests copyright rights exclusively in the commissioning party. Nor can creators subject to a work for hire arrangement use the original work as the basis for creating derivative works; that right also vests in the commissioning party upon creation of a work for hire.

For these reasons, free-lance creators have long supported legislative attempts to confine the work for hire doctrine to its origins in the traditional employment relationship.[5] Those efforts finally came to fruition with the passage of the 1976 Copyright Act. The new copyright statute contained a compromise definition of work for hire that for the first time distinguished between works created by employees and works created by independent contractors on commission. Since the focus in the legislative history was on crafting the circumstances under which commissioned works would be eligible for work for hire treatment, Congress did not pay much attention to the "employee" prong of the definition. The ultimate result was a definition of work for hire that incorporated but did not define works created by employees, and that provided that certain types of commissioned works would be eligible for work for hire treatment if the parties expressly so agreed in a written instrument. 17 U.S.C. § 101. The absence of a statutory

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Follett v. Arbor House Publishing Co., 497 F. Supp. 304, 311 (S.D.N.Y. 1980).

[5] In the course of the hearings that preceded the 1909 Act, publishers acknowledged that payment of a salary to an employee "entitle[d] an employer to all rights to obtain a copyright in any work performed during the hours for which such salary was paid." 2 Legislative History of the 1909 Copyright Act at 65 (E. Brylawski & A. Goldman eds. 1976) (statement of Mr. A.W. Elson of A.W. Elson & Co., educational art publishers). Moreover, an early Supreme Court case involving work for hire presumed that vesting ownership of copyrightable works in employers was logical in the context of the traditional employment relationship. *See Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

definition of "employee," together with ambiguity concerning whether a commissioned work that failed the subdivision (2) tests could qualify as a work for hire under subdivision (1), made the congressional compromise on the work for hire language a precursor to continued uncertainty and disagreements.

If the work for hire controversy is not resolved by this Court, free-lance creators have the most to lose. Much of the litigation involving work for hire questions takes place in New York, where many creators live and work. Notwithstanding the decision by the court of appeals in this case, courts in that jurisdiction are obliged to follow the Second Circuit's ruling in *Aldon Accessories*.[6] Under that decision, the copyrightable works of free-lance creators operating under the supervision and control of a publisher or advertising agency are automatically "employee" works for hire regardless of the type of work involved, whether or not a traditional employment relationship exists, and irrespective of whether the parties executed a written agreement. Unless this Court overrules *Aldon Accessories* and adopts the reasoning of the court below, thousands of free-lance creators will lose all rights in their works as a result of an after-the-fact presumption that they functioned as "employees," even though they received no employment benefits.

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[6] A recent post-*Aldon Accessories* district court decision in the Southern District of New York illustrates the harm that will befall CJC members if the Second Circuit's reasoning is allowed to stand. In *Blum v. Kline*, No. 86 CIV 8149, slip op. at 2-3 (S.D.N.Y. May 17, 1988), the court applied *Aldon Accessories* in ruling that an individual photographer, who concededly was not "actually an employee" of the fashion magazine that commissioned him, would nevertheless be considered an "employee" for copyright purposes if the magazine actively directed and supervised his work. The court further concluded that the extent of supervision and control could be determined only after a full-fledged trial at which the roles played by the parties would be explored.

II. GRANTING THE PETITION IS NECESSARY TO RESOLVE A CLEAR AND IRRECONCILABLE CONFLICT IN THE COURTS OF APPEALS

The work for hire cases that arose in the first few years after the 1976 Copyright Act went into effect on January 1, 1978 suggested that the courts would adhere to Congress' intent that subdivision (2) of the definition of work for hire should be the exclusive source for determining the eligibility of commissioned works for that status. These first few cases did not seriously entertain the notion that a commissioned work that cannot meet the subdivision (2) criteria can nevertheless qualify as a work for hire under subdivision (1). *See Childers v. High Soc'y Magazine*, 557 F. Supp. 978, 984 (S.D.N.Y. 1983); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 257 (D.Neb. 1982); *BPI Sys., Inc. v. Leith*, 532 F. Supp. 208, 210 (W.D. Tex. 1981); *Mister B Textiles, Inc. v. Woodcrest Fabrics, Inc.*, 523 F. Supp. 21, 23-24 (S.D.N.Y. 1981); *Meltzer v. Zoller*, 520 F. Supp. 847, 854-55 (D.N.J. 1981).[7]

The Second Circuit's 1984 decision in *Aldon Accessories* reversed that trend. In that case, the Second Circuit held that a commissioned work produced by an independent contractor was a work for hire under the "employee" prong of the statutory definition if the commissioning party exercised a sufficient degree of direction and control over the efforts of the contractors. The Second Circuit noted that judicial decisions construing the

---

[7] In the *Meltzer* case, for example, the court held that architectural drawings could not be works for hire under the 1976 Act because they were not included in the categories listed in subdivision (2) of the definition of that term. 520 F. Supp. at 854. This was true, the court reasoned, even though architectural drawings were considered works for hire under the 1909 Act, because Congress was presumably aware of the prior applications of that concept and deliberately excluded architectural plans from the subdivision (2) categories. *Id.*

1909 Act found an employer-employee relationship established even where the creator indisputably was not a "regular or formal" employee. *Aldon Accessories*, 738 F.2d at 552 (citations omitted). The court concluded that "[n]othing in the 1976 Act or its legislative history indicates that Congress intended to dispense with this prior law . . . ." *Id.* According to the Second Circuit, subdivision (2) of the work for hire definition was intended to apply only "where the contractor did all of the creative work and the hiring party did little or nothing." *Id.* (citation omitted).

The Fourth Circuit's decision in *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, *supra*, adopted the *Aldon Accessories* analysis. That court agreed that an independent contractor could be classified as an employee if a sufficient degree of supervision and control was exercised by the commissioning party. 810 F.2d at 413. The court held, however, that there was insufficient evidence to show that supervision and control was actually exercised over the advertisements in question, and thus, that the newspaper staff were not "employees" of the advertisers. *Id.*

The Seventh Circuit extended the *Aldon Accessories* analysis in *Evans Newton Inc. v. Chicago Systems Software*, *supra*. In holding that software created by an independent contractor was a work for hire, the Seventh Circuit viewed the mere right to direct and control the creator's work as sufficient to render him an "employee"—even in the absence of any evidence that control was actually exercised. *Evans Newton*, 793 F.2d at 894. *See also Real Estate Data Inc. v. Sidwell*, 809 F.2d 366 (7th Cir. 1987) (applying 1909 Act, to reach the same result with respect to maps).

The *Aldon Accessories* interpretation was resoundingly rejected by the Fifth Circuit in *Easter Seal Society v. Playboy Enterprises*, *supra*. Adopting what it called a

"literal interpretation" of the 1976 definition of work for hire, the Fifth Circuit held that subsection (1) should be applied only to "agency-law" employees, and that eligibility of all works by independent contractors to be works for hire must be determined solely by reference to whether the subdivision (2) conditions are satisfied. *Easter Seal*, 815 F.2d at 334-35.

The court below agreed with the Fifth Circuit's "literal interpretation." It held that a work created by an independent contractor (*i.e.*, a creator who is not an employee under agency law principles) qualifies as a work for hire *only* if the two conditions set out in subdivision (2) are satisfied. The work must fall within one of the eligible categories listed in that subdivision, and the parties must agree in writing that the work shall be considered "for hire." 846 F.2d at 1494. The court found that the sculpture commissioned by CCNV in this case could not be a work for hire because respondent was clearly not an "employee" of CCNV under agency principles, and because neither of the statutory conditions prescribed by subdivision (2) of the work for hire definition were satisfied.

These precedents make clear that a stark conflict exists between the Second, Seventh and Fourth Circuits on the one hand, and the District of Columbia and Fifth Circuits on the other. There is clear and unequivocal disagreement about whether Congress intended in the 1976 Act to overrule the common-law tests that developed under the 1909 Act, and to "*radically* revise [the] 'work for hire' doctrine." 846 F.2d at 1496 (citing *Easter Seal*, *supra*, 815 F.2d at 330) (emphasis in original). The circuit courts further disagree about whether subdivision (2) of the 1976 definition was intended to be the exclusive basis for determining whether a commissioned work created outside the traditional employment relationship qualifies as a work for hire.

With five circuits on record as clearly divided over the proper interpretation of the work for hire provisions of the 1976 Act, the remaining circuits will no doubt choose between two conflicting and irreconcilable interpretations. Only review by this Court can forestall a further deepening of the conflict that is presented clearly and unequivocably by the decision in this case.

CONCLUSION

This case presents fundamental issues of national importance to the fair and effective administration of United States copyright laws. Work for hire has been interpreted by three circuit courts to deprive creators of the authorship and copyright rights that are essential to their economic survival. Such an interpretation undermines the central purposes of the copyright laws, which are to encourage creative activity for the benefit of the public and to ensure fair compensation to creators for their contributions. In adopting an interpretation that is consistent with these purposes, the decision below presents a clear opportunity for this Court to settle the work for hire controversy that has so divided the lower courts.

Respectfully submitted,

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August 19, 1988

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APPENDIX A

THE COPYRIGHT JUSTICE COALITION

Advertising Photographers of America
Advertising Photographers of America—LA
American Federation of Teachers, AFL-CIO
American Federation of Television and Radio Artists, AFL-CIO
American Society of Journalists and Authors
American Society of Magazine Photographers
Art Directors Club of New York
Art Directors Club of Washington
Artists in Print
Association of Medical Illustrators
Authors Guild, Inc.
Boston Visual Artists Union
Committee of Interns and Residents
Council of Writers Organizations
- Albany Writers Guild
- Aviation/Space Writers Association
- Boating Writers International
- Chicago Women in Publishing
- Dance Critics of America
- Editorial Freelancers Association
- Independent Writers of Chicago
- International Motor Press Association
- Midwest Travel Writers Association
- Mystery Writers of America
- National Association of Science Writers

National Book Critics Circle
Outdoor Writers Association of America
Philadelphia Writers Association
Romance Writers of America
Science Fiction Writers of America
St. Louis Writers Guild
Travel Journalists Guild
United States Ski Writers Association
Washington Independent Writers
Writers Guild of America East
Foundation for the Community of Artists
Graphic Artists Guild
National Artists Equity Association
National Cartoonists Society
National Writers Union
Pen American Center
Screen Actors Guild, AFL-CIO
Society of Authors Representatives
Society of Illustrators of New York
Songwriters Guild of America
Visual Artists Association
Writers Watch

Supreme Court, U.S.
FILED
DEC 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-293

(5)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Petitioners,

v.

JAMES EARL REID,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT APPENDIX

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December 22, 1988

PETITION FOR CERTIORARI FILED AUGUST 17, 1988
CERTIORARI GRANTED NOVEMBER 7, 1988

RELEVANT DOCKET ENTRIES

June 2, 1986	Complaint and Motion for Preliminary Injunction filed in the United States District Court for the District of Columbia
July 25, 1986	Motion for Preliminary Injunction heard and granted by the United States District Court for the District of Columbia
February 9, 1987	Order of the United States District Court for the District of Columbia entering judgment for Plaintiffs following bench trial
March 11, 1987	Notice of Appeal to the United States Court of Appeals for the District of Columbia filed by Defendants
January 29, 1988	Oral argument before the United States Court of Appeals for the District of Columbia Circuit
May 20, 1988	Opinion of the United States Court of Appeals for the District of Columbia Circuit reversing the judgment of the United States District Court for the District of Columbia and remanding the case for further proceedings
July 13, 1988	Order of the United States Court of Appeals for the District of Columbia Circuit staying mandate until August 18, 1988
August 17, 1988	Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed in the Supreme Court of the United States

August 23, 1988	Order of the United States Court of Appeals for the District of Columbia Circuit extending stay of mandate pending final disposition of the Petition for Writ of Certiorari by the Supreme Court of the United States
November 7, 1988	Order of the Supreme Court of the United States granting Petition for Writ of Certiorari

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BRIEF FOR PETITIONERS

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December 22, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, under the "work made for hire" provisions of the Copyright Act of 1976, 17 U.S.C. §§ 101 and 201(b), Petitioners own the copyright in a statue made by Respondent and others at Petitioners' request and expense and under Petitioners' direct supervision and control.

LIST OF PARTIES

1. Petitioners are the Community for Creative Non-Violence, an unincorporated association of individuals, and Mitch Snyder.
2. Respondent is James Earl Reid.
3. Ronald Purtee was named a defendant in the District Court; however, he did not appear before the District Court or the Court of Appeals.
4. The Copyright Justice Coalition, an ad hoc group of some fifty different organizations, filed an amicus curiae brief in the Court of Appeals in support of Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-293

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
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v.

JAMES EARL REID,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 846 F.2d 1485 (D. C. Cir. 1988), and is reproduced in the Appendix to the Petition for Writ of Certiorari ("App.") at App. 1a-28a. The opinion of the United States District Court for the District of Columbia is reported at 652 F. Supp. 1453 (D.D.C. 1987), and is reproduced at App. 29a-36a.

JURISDICTION

This case arises under the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* Federal jurisdiction is founded upon 28 U.S.C. § 1338. After a bench trial, the District Court (Jackson, J.) entered judgment for Petitioners. The Court of Appeals (R. Ginsburg, J.) reversed and re-

manded in a decision rendered May 20, 1988. No petition for rehearing was filed. The Petition for Writ of Certiorari was timely filed on August 17, 1988, and was granted on November 7, 1988. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTE INVOLVED

Sections 101 and 201(a) & (b) of the Copyright Act of 1976, 17 U.S.C. §§ 101 and 201(a) & (b), are set forth in the Petition for Writ of Certiorari at 2.

STATEMENT OF THE CASE

This case calls upon the Court to resolve a conflict among several circuits over the proper interpretation of the "work made for hire" ("work for hire") doctrine of the Copyright Act of 1976 ("Act" or "1976 Act"), 17 U.S.C. §§ 101 and 201(b). This doctrine provides that an "employer" owns the copyright in a work made by an "employee within the scope of his or her employment." The issue on which the courts have divided involves construction of the term "employee," which is not defined in the 1976 Act or in the Committee reports accompanying the Act. Consistent with case law developed under the Copyright Act of 1909, the Second Circuit has concluded that an employment relationship exists, for purposes of the 1976 Act, where the artist works at the request and expense, and under the supervision and control, of the hiring party; the Fourth and Seventh Circuits have followed this approach. The Fifth Circuit and the District of Columbia Circuit below, however, have expressly rejected the Second Circuit analysis and prior case law; they have concluded that only agency law employees, as determined by reference to certain Restatement of Agency factors, are copyright employees under the 1976 Act.

The dispute here concerns ownership of the copyright in a statue entitled "Third World America"— a contemporary Nativity scene depicting a homeless black family

huddled on a streetside steam grate. Petitioners are the Community for Creative Non-Violence ("CCNV"), a nonprofit unincorporated association of individuals dedicated to eliminating homelessness in America, and Mitch Snyder ("Snyder"), a member of CCNV. Respondent, James Earl Reid ("Reid"), is an artist.

The record below shows that CCNV members conceived of "Third World America," "in starkly specific detail," as the symbol of the cause they espouse. 652 F. Supp. at 1456 (App. 35a). CCNV selected Reid to sculpt the statue's figures, and paid his expenses ($15,000, which was to include the cost of maintaining his studio, purchasing the necessary materials, and the hiring of a dozen or so "assistants") during the seven-week period that he worked full-time on the CCNV project. Reid, who expressed sympathy with CCNV's cause and who apparently saw this as an opportunity to be associated with a highly publicized work of art, willingly agreed to forego a "salary" as such and to donate his services, like any other CCNV volunteer; he never bargained for copyright ownership with CCNV. CCNV assumed full responsibility for completion of other portions of "Third World America" and actively supervised and directed Reid's efforts. They insisted upon several significant details in the work (as well as its general design); rejected Reid's contrary suggestions; and set the deadlines for completion of the project. Throughout, CCNV members sought to "assure" that Reid "produced what they, not he, wanted" and that the statue "convey the message they had intended for it." 652 F. Supp. at 1456-57 (App. 35a).

After a two-day bench trial, the District Court below applied the Second Circuit supervision and control standard and found that CCNV and Reid had a copyright employment relationship for purposes of producing "Third World America." The Court of Appeals acknowledged that the parties satisfied the Second Circuit standard, but reversed because it concluded they did not have an agency law employment relationship. Petitioners submit that the

Second Circuit standard reflects a proper interpretation of the 1976 Act and that, under the circumstances of this case, the District Court's judgment should have been affirmed. Alternatively, if some other standard is to be applied, at the very least this case should have been remanded to the District Court to consider the facts in light of that standard.

1. Statement Of Facts

a. *Genesis Of "Third World America"*

The concept for "Third World America" originated with Snyder and other CCNV members who, in October 1985, decided to produce a work which would raise national consciousness for the plight of the homeless. From the outset, CCNV was quite specific about the work to be produced: CCNV determined that the work was to be a sculpture of a modern creche portraying two contemporary homeless adults huddled with their infant child on a streetside steam grate; that the family was to be black because most of the homeless in Washington, D.C. are black; that the figures were to be life-sized; that the steam grate would be positioned on top of a pedestal containing special effects equipment to produce steam swirling around the figures; that the work would be entitled "Third World America"; and that the base would bear the inscription "And Still There Is No Room At The Inn." 652 F. Supp. at 1454 (App. 30a).

CCNV planned to unveil "Third World America" in mid-December 1985 as part of the Christmas Pageant of Peace in Washington, D.C. The work was ultimately to be used as a "centerpiece of a one-or-two-year campaign of education and outreach and fundraising" for and concerning the homeless. 2/2 Tr. 24 (Snyder).[1] CCNV in-

[1] The designation "Tr." preceded by a date refers to the transcript of the trial before the District Court below, including the transcript of the hearing on the preliminary injunction motion (which was incorporated into the trial record). The name in parentheses indicates the identity of the witness.

tended to place the statue on display in major museums throughout the country, and to coordinate such displays with various educational activities, such as speaker series, musical events, and related photo and art exhibits. 7/25 Tr. 14 (Snyder). CCNV also intended to publicize "Third World America" in several media, such as posters, photographs and Christmas cards, as a "visual image representing homelessness in America" and as a means of raising money to deal with homelessness. 7/25 Tr. 14, 19, 29 (Snyder).

At the recommendation of Tom Lewis, an artist active in the homeless cause, Snyder contacted Reid in late October 1985 and explained the nature and purpose of the work that CCNV wished to produce. During the course of two telephone conversations, Reid agreed to sculpt the figures for "Third World America" and to do so, as CCNV insisted, in time for the Pageant of Peace. Snyder rejected Reid's proposal to cast the statue in bronze as too costly and time-consuming. 2/2 Tr. 143-44 (Reid). Reid agreed to cast the statue in a synthetic substance called "Design Cast 62," with which he had never before worked. 846 F.2d at 1487 (App. 3a); 2/2 Tr. 147 (Reid).

Snyder initially told Reid that CCNV expected to pay no more than $5,000 for the statue. 2/3 Tr. 156 (Reid). Reid said he would forego any salary and donate his services because he, too, sympathized with the homeless cause. 2/2 Tr. 146 (Reid). However, Reid estimated that his "costs," for which he expected reimbursement, would be between $12,000 and $15,000. 652 F. Supp. at 1454 (App. 31a). Reid explained the nature of these costs as follows:

> I needed a number of assistants and workers to assist me, and I needed materials, and I needed to maintain my quarters, so to speak, which included the rental of my studio and so forth.

2/3 Tr. 155-56 (Reid); *see* 7/25 Tr. 41 (Snyder). CCNV made periodic payments to Reid, and ultimately provided him the full $15,000. 652 F. Supp. at 1455 (App. 31a-33a). This amount was raised through a special auction of art works donated by artists who supported the "Third World America" project in order to benefit the homeless —and who were assured by CCNV that their efforts would not "go to another artist's profit." 2/2 Tr. 100 (Beck); *see* 7/25 Tr. 21 (Snyder); 652 F. Supp. at 1455 (App. 31a).

b. *Production Of The "Third World America" Figures*

With the help of some twelve "assistants," Reid worked full-time over a period of seven weeks sculpting the "Third World America" figures. 2/3 Tr. 189 (Reid). CCNV "monitored the progress of the work, not simply to approve Reid's embodiment of their idea, but to guide his expression and coordinate with his effort CCNV's construction of the steam grate pedestal." 846 F.2d at 1497 (App. 24a-25a). CCNV's supervisory efforts took several forms.

Snyder and other members of CCNV made some "ten to fifteen" trips to Reid's studio in Baltimore. Snyder testified that the purpose of these trips was "to make sure that the statue was what we [CCNV] wanted it to be." 7/25 Tr. 12 (Snyder); *see* 652 F. Supp. at 1455 (App. 32a-33a); 2/2 Tr. 52 (Snyder); 2/2 Tr. 73-74, 89-90 (Newman). According to Snyder, Reid was chosen by CCNV in part because of his geographic proximity to CCNV's shelter in Washington, D.C., thereby permitting CCNV to "work with him on a continuous basis . . . ." 7/25 Tr. 9 (Snyder). At CCNV's request, Reid also came to Washington, D.C. to observe the homeless, so that, in the words of Snyder, "he [Reid] could see up

close what it was that we wanted to create and get a sense of the feel of the image that we were working towards." 7/25 Tr. 11-12 (Snyder); *see* 652 F. Supp. at 1455 (App. 32a).

CCNV also required Reid to produce design sketches and photographs of the work-in-progress. 2/2 Tr. 39-41, 58-59 (Snyder). Reid testified that the sketches and photographs were created solely for "fundraising" purposes; CCNV witnesses, however, testified that these items also provided a means for checking Reid's work. 652 F. Supp. at 1455 n.4 (App. 32a); *see* 2/2 Tr. 39-41, 54 (Snyder); 2/2 Tr. 89 (Newman). Tom Lewis, the artist who recommended Reid and who "assisted" him essentially full-time in the sculpting of the statue, served as a liaison between Reid and CCNV so that CCNV could continuously monitor and approve the progress of the work. 2/2 Tr. 121-22 (Lewis); *see* 2/2 Tr. 53 (Snyder).

Throughout the process, CCNV sought to ensure that Reid "remained faithful" to CCNV's original "vision" of the work. 7/25 Tr. 22 (Snyder). CCNV also made certain significant changes in details proposed by Reid. CCNV rejected Reid's idea to place the family's belongings in "suitcases" or "shopping bags" and told him instead to use a shopping cart. 652 F. Supp. at 1455 & n.5 (App. 32a). CCNV also rejected Reid's proposal to have the mother seated on the steam grate with the infant in her lap and the father standing behind: CCNV directed that all figures be placed in a recumbent position, as they would normally be found taking advantage of the heat from the grate. 652 F. Supp. at 1455 & n.5 (App. 32a). As Lewis testified, "[t]he major decisions about the idea, the placement and the detail . . . were made by Mitch Snyder and CCNV." 2/2 Tr. 124 (Lewis); *see* 7/25 Tr. 12-13 (Snyder) ("We dictated to the artist what it was in detail, what we wanted to see created at each step of the way.").

Reid missed the December 12, 1985 deadline set by CCNV for the completion of the figures. Although upset by the fact that the statue was not completed in advance of the Pageant of Peace as the parties had agreed, Snyder nevertheless directed Reid to take the time necessary to ensure that "Third World America" would be a "first-class work." 652 F. Supp. at 1455 (App. 33a). Reid's portion of the statue was finally delivered to the Ellipse on December 24, 1985.

c. *Production Of The "Third World America" Steam Grate And Base*

CCNV determined at the outset that the family in "Third World America" should be enshrouded in steam. The objective was to recreate an "Inferno-like" scene similar to one that Snyder had encountered when he first viewed a homeless man taking advantage of the heat from a steam grate. 7/25 Tr. 11 (Snyder). The steam grate and steam effect constitute an interdependent part of "Third World America." *See* 846 F.2d at 1496 (App. 22a-23a); 7/25 Tr. 11, 15, 16 (Snyder); 2/2 Tr. 62 (Snyder); 2/2 Tr. 97 (Beck). As Snyder testified, the statue

> is a profoundly powerful image, but its power is in the totality of the image. I mean steam rising around those figures is what creates the final image that we want to see created. And the base, the statues, all of it is part of it. It goes together.

7/25 Tr. 33 (Snyder). The steam grate itself was intended by CCNV to symbolize the manger in the traditional creche because, Snyder testified, the steam grate is "one of the few places that [homeless] people can find heat without illegally occupying unoccupied buildings." 7/25 Tr. 7 (Snyder).

Although the figures in "Third World America" were produced by Reid, the steam grate and base (with the inscription "And Still There Is No Room At The Inn")

were produced by a third party, under CCNV's direction and without any reliance on Reid. 7/25 Tr. 15, 19 (Snyder); 2/2 Tr. 29, 54-55 (Snyder). The production of continuous steam flowing through the grate was also a complicated undertaking. in which Reid played no role. 2/3 Tr. 254 (Reid). CCNV paid approximately $7,000-$8,000 for the production of the steam grate and base and steam effect. 652 F. Supp. at 1455 (App. 33a).

d. *The Controversy Over "Third World America"*

CCNV and Reid never entered into any written agreement concerning "Third World America." Nor did they have any agreement, written or oral, concerning copyright ownership of that work. Reid nevertheless carved a copyright notice on the statue "to indicate his claim to a copyright," a claim which the District Court found to have been made by Reid "for the first time" when he delivered the completed figures to the Ellipse. 652 F. Supp. at 1455 & n.7 (App. 33a).

The dispute between the parties arose in March 1986 when Reid, who had possession of "Third World America" for purposes of making certain repairs, refused to return the work to CCNV. Reid announced that he intended to take the sculpture on his own exhibition tour, thereby precluding CCNV from going forward with its exhibition plans in order to raise money for the homeless. Reid expressed concern for the welfare of the statue, claiming that it could not withstand the rigors of CCNV's intended exhibition tour but would withstand his "more modest" tour. 652 F. Supp. at 1456 (App. 33a-34a). He also urged CCNV to cast the statue in bronze, a proposal which CCNV again rejected as too costly. CCNV indicated that it would agree to the bronzing if Reid would cover the cost. 652 F. Supp. at 1456 (App. 33a-34a). Reid never did so.

Reid also insisted, at that time, that he had the right to produce and to sell derivative works of "Third World

America." CCNV responded that, consistent with its representations to those artists who helped fund "Third World America" (*see* page 6, *supra*), CCNV "had no intention of allowing [Reid] to use that statue, which was created for and about homeless people, for his personal profit." 7/25 Tr. 27-28, 40 (Snyder).

2. Proceedings Below

a. *The District Court*

CCNV filed the present lawsuit in June 1986, seeking return of the sculpture and a declaration that it owns the copyright in it. Following a July 25, 1986 hearing on CCNV's motion for a preliminary injunction, the District Court ordered the return of the statue to CCNV. The District Court later conducted a two-day bench trial, during which testimony was presented by Snyder, Reid, Lewis and two CCNV members involved in the production of "Third World America" (Clifford Newman and Elizabeth Beck). In several respects, Reid's testimony conflicted with that of the other witnesses on the issue of creative control. Both sides, however, agreed that the issue of copyright ownership turned upon who possessed such control. *See* 2/6 Tr. 281-91 (Zinman).

The District Court resolved the principal factual conflicts in favor of CCNV, and entered a final judgment declaring that Snyder (as trustee for CCNV) owns the copyright in "Third World America" pursuant to the work for hire doctrine. In reaching its decision, the District Court focused upon CCNV's control over the creation of "Third World America." The District Court concluded that CCNV and its members were the "motivating factor in the procreation" of "Third World America"; that they "not only conceived the idea" underlying the work, but "did so in starkly specific detail"; and that,

> while much was undoubtedly left to [Reid's] discretion . . . CCNV nevertheless directed enough of his effort to assure that, in the end, he had produced

> what they, not he, wanted, notwithstanding his creative instincts may have been in harmony with theirs.

652 F. Supp. at 1456 (App. 35a).

As the District Court also found, CCNV took the steps necessary to make certain that the statue would "convey the message they had intended for it." 652 F. Supp. at 1457 (App. 35a). The District Court rejected Reid's testimony that he had "reserved" copyright in the work and had retained "total [artistic] control" as being "without any corroboration" and "inconsistent with the tenor of the enterprise." 652 F. Supp. at 1454-55 n.3 (App. 31a). Based upon the record, the District Court determined that CCNV "had specific ideas about the sculpture's ultimate appearance which they would have been unwilling to surrender to someone else's 'control,' even the artist's." 652 F. Supp. at 1455 n.3 (App. 31a).

b. *The Court Of Appeals*

On appeal, Reid emphasized that he was not challenging the District Court's findings of fact. *See* Brief for Appellant in Docket No. 87-7051 at 10 (D.C. Cir., filed November 20, 1987). Instead, Reid controverted the "control" standard which he had advanced before the District Court. *See* page 10, *supra*. According to Reid on appeal, the proper standard is the one articulated by the Fifth Circuit in *Easter Seal Soc'y for Crippled Children and Adults of Louisiana, Inc.* v. *Playboy Enterprises, Inc.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988) (*"Easter Seal"*), a case which was decided after the District Court below had entered judgment in the present case. The court in *Easter Seal* held that an artist is not an employee under the work for hire doctrine of the Copyright Act unless he or she is an employee under agency law, and that the existence of an employment relationship is determined by reference to the factors set forth in Restatement (Second) of Agency § 220 (1958) (reprinted at App. 37a).

The Court of Appeals below followed the *Easter Seal* approach and concluded that Reid was not CCNV's agency law employee because Reid had donated his services, worked in his own studio and personally chose his own assistants, and because the creation of sculptures was not CCNV's "regular business." 846 F.2d at 1494 n.11 (App. 19a). The Court of Appeals also expressly rejected the "supervision and control" standard set forth in *Aldon Accessories Ltd.* v. *Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984) ("*Aldon*") and followed in *Evans Newton, Inc.* v. *Chicago Systems Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986); *Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987); and various district court decisions. *See Easter Seal*, 815 F.2d at 333-34.[2] The Court of Appeals made clear, however, that:

> [C]onflict with *Aldon Accessories* is unavoidable. Had we determined that the "sufficiently supervised and directed" test framed in that case correctly construed the 1976 Act, we would have affirmed the district court's judgment declaring Mitch Snyder, as trustee for CCNV, exclusive owner of copyright in the sculptural work "Third World America."

846 F.2d at 1497 n.18 (App. 25a).

The Court of Appeals observed that on "the record as it now stands," "Third World America" may qualify as a "joint work," the copyright in which CCNV may share

[2] The court in *Aldon* upheld the following jury instruction:

> "A work for hire is a work prepared by what the law calls an employee working within the scope of his employment. What that means is, a person acting under the direction and supervision of the hiring author, at the hiring author's instance and expense. It does not matter whether the for-hire creator is an employee in the sense of having a regular job with the hiring author. What matters is whether the hiring author caused the work to be made and exercised the right to direct and supervise the creation."

738 F.2d at 551.

with Reid or perhaps other parties. 846 F.2d at 1495-98 (App. 20a-26a). It remanded this case to the District Court for "comprehensive consideration" of the issues related to "joint works," 846 F.2d at 1499 (App. 28a), including whether the various "assistants" engaged by Reid were his "employees" under agency law principles. 846 F.2d at 1498 (App. 26a). If "Third World America" is considered a "joint work" and not a work for hire, CCNV would be unable to control the exploitation of that work; Reid (and any others who qualified as joint authors) would be permitted to make virtually any use they wished of the work (including the preparation of derivative works), without regard to the purposes for which it was created. *See* 846 F.2d at 1498-99 (App. 27a). Likewise, CCNV would be obligated to account to Reid and the other "authors" for any profits from "Third World America" which would otherwise go solely to providing for the homeless. *See* 846 F.2d at 1498 (App. 27a).

Neither CCNV nor Reid has sought review of the Court of Appeals remand order respecting joint works. The issue before this Court concerns the Court of Appeals ruling that the work for hire doctrine is inapplicable in the circumstances of this case. If the work for hire doctrine is applicable, as the District Court found, the questions related to joint works become moot.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Section 201(b) of the 1976 Act provides: "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all rights comprised in the copyright." 17 U.S.C. § 201(b). The term "work made for hire" is defined as

> 1) a work prepared by an employee within the scope of his or her employment; or

> 2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audio-visual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101.[3]

CCNV does not claim that "Third World America" is a "specially ordered or commissioned" work or that it comes within subdivision (2) above. Rather, as the District Court correctly recognized, the issue here is whether CCNV established an "employment" relationship with Reid, within the meaning of subdivision (1), by virtue of its close and continuous supervision and control of Reid's efforts during the seven-week period that he worked full-time on the CCNV project; its payment of Reid's expenses (including the maintenance of his studio, the purchase of materials and the hiring of assistants) during this period; and Reid's provision of services to CCNV in order to implement CCNV's specific objectives, in response to deadlines imposed by CCNV, and in return for identification with a well-publicized work to benefit the homeless.

2. The District Court held, and the Court of Appeals correctly acknowledged, that CCNV and Reid had a copyright employment relationship under the Second Circuit supervision and control standard. That standard

[3] The classification of a work as a "work for hire" has a number of important consequences under the Copyright Act, in addition to determining the author and thus copyright owner of the work. Works for hire are excluded from Sections 203(a) and 304(c) of the Act, 17 U.S.C. §§ 203(a) and 304(c), which permit authors unilaterally to terminate copyright assignments after a period of 35 years. Copyright normally endures for the life of the author plus 50 years; copyright in a work for hire, however, lasts for 75 years from publication or 100 years from creation, whichever is shorter. 17 U.S.C. §§ 302(a) & (c).

had been applied consistently by the courts under the 1909 Copyright Act. And there is absolutely nothing in the 1976 Act or its legislative history which evidences any Congressional intent to repudiate that standard. To the contrary, the supervision and control standard is fully consistent with the terms, purposes and history of the 1976 Act.

It was recognized from the outset of the copyright revision process that the very distinction between "employee works" and "commissioned works" lies in the supervision and control which is generally exercised by an employer. Furthermore, subdivision (1) of the work for hire definition, which contains the employee provision, was essentially non-controversial. It was intended to codify the "long established" principle that the employer owns the copyright in a work created by an employee within the scope of employment, and to leave existing law intact.

The work for hire controversy instead centered on identifying the circumstances under which commissioned works would come within subdivision (2). This controversy was resolved when the House Judiciary Committee adopted a compromise agreement among certain of the interested parties. The agreement identified those commissioned works which might qualify as works for hire under subdivision (2), but made no mention whatsoever of subdivision (1). Clearly, Congress intended to distinguish *among* the categories of commissioned works which may qualify as works for hire. By doing so, however, Congress did not intend to change the recognized judicial standard for distinguishing *between* commissioned works, on the one hand, and employee works, on the other hand. The Court of Appeals has simply read too much into Congress' adoption of subdivision (2).

The supervision and control standard is also deeply ingrained in the very purposes of copyright. Where, as here, the employer not only conceives of a particular work but does so in "starkly specific detail" and then directs and finances the implementation of that concept to satisfy the employer's objectives, the employer's actions are those

which the copyright reward is intended to stimulate. Furthermore, the supervision and control standard avoids the severe practical difficulties which necessarily flow from fractionalization of copyright. Indeed, because the Court of Appeals below has discarded the supervision and control standard, it has recognized that the dozen or so assistants who worked under Reid's (and ultimately CCNV's) supervision and control may all qualify as joint authors of "Third World America" (with a duty of accounting to each other).

3. The Court of Appeals' adoption of a common law agency test to determine copyright employment status is inconsistent with both the thrust of Section 301(a) of the Copyright Act, 17 U.S.C. § 301(a), (preempting common law rights that are equivalent to copyright), and with the logic of *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) (term "employee" in federal statutes should not be defined simply by reference to common law agency principles). Moreover, there is no indication whatsoever in the legislative history of the 1976 Act that Congress ever considered replacing the existing judicial approach with one that focused exclusively upon agency law. Unlike the supervision and control standard, the Restatement of Agency factors were developed for purposes having nothing to do with copyright policy.

If, however, the agency law approach is adopted, at the very least this case should have been remanded to the District Court below on the work for hire issue (as it was on the joint work issue). *See Kelley* v. *Southern Pacific Co.*, 419 U.S. 318 (1974). The existence of an agency law relationship is an issue to be resolved by the trier of fact. The District Court, which conducted a two-day bench trial in this case, has never had the opportunity to consider the facts in light of the agency law standard; indeed, both CCNV and Reid had advanced the Second Circuit control standard before the District Court. The Restatement also establishes a control test, which some courts have found to be satisfied in circumstances less compelling than here.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT, IN THE CIRCUMSTANCES OF THIS CASE, CCNV AND REID ENTERED INTO A COPYRIGHT EMPLOYMENT RELATIONSHIP FOR PURPOSES OF PRODUCING "THIRD WORLD AMERICA"

In construing the 1976 Act, "it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'" *Mills Music, Inc.* v. *Snyder*, 469 U.S. 153, 164 (1985) ("*Mills Music*") (citations omitted). The "ordinary meaning" of the term "employee" is plainly consistent with the Second Circuit *Aldon* standard, and is broad enough to encompass the relationship between CCNV and Reid.[4]

The Court, however, also has stated that: "Where the term 'employee' has been used in statutes without particularized definition it has not been treated by the courts as a word of definite content." *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 546 n.29 (1940) (citations omitted). In *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) ("*Hearst*"), the Court rejected the argument that the term "employee," in the National Labor Relations Act ("NLRA"), may be defined simply by reference to the common law of agency. The Court explained that there is no "simple, uniform and easily applicable test" of employment under federal statutes.

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[4] *See Black's Law Dictionary* 471 (5th ed. 1979) ("employee" is a "person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed"); *Webster's New World Dictionary of the American Language* 459, 1596 (2d ed. 1976) ("employee" is "a person hired by another, or by a business firm, etc., to work for wages or salary"; "wage" is "money paid to an employee for work done, and usually figured on an hourly, daily, or piecework basis" or "what is given in return; recompense").

322 U.S. at 120. Mr. Justice Rutledge, speaking for the Court in *Hearst*, explained that the question of who is an "employee" for purposes of a particular federal law

> *must be answered primarily from the history, terms and purposes of the legislation.* The word "is not treated by Congress as a word of art having a definite meaning. . . ." Rather "it takes color from its surroundings. . . [in] the statute where it appears," . . . and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained."

322 U.S. at 124 (citations omitted) (emphasis added); *accord United States* v. *Silk*, 331 U.S. 704, 713 (1947).[5]

Application of the *Hearst* approach to the facts of this case makes clear, as the District Court found, that CCNV and Reid had an employment relationship within the meaning of the 1976 Act's work for hire provisions.

A. The District Court's Finding Of An Employment Relationship In The Circumstances Of This Case Is Consistent With The History, Terms And Purposes Of The 1976 Copyright Act

At the time that Congress enacted the revision of the copyright law in 1976, the courts had a settled approach to determining whether an employment relationship exists under the work for hire doctrine of the 1909 Copyright Act.[6] The "hallmark of 'an employment for hire'

[5] Congress specifically amended the NLRA to overrule the holding in *Hearst*, by providing that "general agency principles could not be ignored in distinguishing 'employees' from independent contractors." *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971). The general approach to defining employment relationships, as set forth in *Hearst* and quoted above, was not affected by such Congressional action. *See* 404 U.S. at 168; *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891-92 (1984).

[6] Section 26 of the 1909 Act, 17 U.S.C. § 26 (1970), which effectively codified the Court's decision in *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239 (1903), provided that the "word 'author' shall include an employer in the case of works made for hire." *See also* 17 U.S.C. § 24 (1970) (affording renewal rights to the "employer for whom such work is made for hire"). During consideration of the bills which led to the 1909 Act, at least one party suggested that the terms in the work for hire provisions were vague and should be more carefully defined. 5 Legislative History of the 1909 Copyright Act M55 (Brylawski & Goldman eds. 1976). Congress, however, chose not to do so.

relationship" under that Act was whether the hiring party "could have exercised the requisite power to control or supervise [the artist's] work." *Epoch Producing Corp.* v. *Killiam Shows, Inc.*, 522 F.2d 737, 744 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976) (citations omitted). As the Second Circuit noted in *Scherr* v. *Universal Match Corp.*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970) ("*Scherr*"), the "essential factor" is

> *whether the employer possessed the right to direct and to supervise the manner in which the work was being performed.* . . . Other pertinent, but non-essential, considerations, are those indicating at whose insistence, expense, time and facilities the work was created. . . . Additionally, the nature and amount of compensation or the absence of any payment received by the employee for his work may be considered; but when compared with the above factors it is of minor relevance. See Nimmer, *supra* at § 62.2.

Scherr, 417 F.2d at 500 (citations omitted) (emphasis added).[7]

[7] The test has been phrased by the courts, including the District Court below, in terms of a "right to control," thereby implying that the actual exercise of that right is not necessary to establish an employment relationship. *See Murray* v. *Gelderman*, 566 F.2d 1307, 1310-11 (5th Cir. 1978). As a practical matter, however, it is difficult to demonstrate the existence of a right to control in a litigation context without evidence of the actual exercise of that right—particularly since the control issue typically arises, as in the present case, where there is no written agreement which specifies each party's rights.

The Second Circuit in *Aldon* concluded that the same approach is to be followed in determining the existence of an employment relationship for purposes of the 1976 Act. Under this approach, as the District Court held and the Court of Appeals acknowledged, CCNV and Reid had a copyright employment relationship. 846 F.2d at 1497 n.18 (App. 25a); 652 F. Supp. at 1455-56 (App. 34a-36a).

Nowhere in the 1976 Act or in the Act's legislative history does Congress state that it intended to jettison the control standard or otherwise to reject the pre-Act judicial approach to identifying a work for hire employment relationship. *Aldon*, 738 F.2d at 552. Nevertheless, the Court of Appeals below concluded that "Congress intended to '*radically* revise' work for hire doctrine" and to overrule the pre-Act work for hire case law. 846 F.2d at 1494 (App. 18a), *quoting Easter Seal*, 815 F.2d at 330 (emphasis in original). The Court of Appeals based this conclusion on the fact that Congress provided separate treatment in the 1976 Act work for hire provisions for "commissioned works." 846 F.2d at 1494 (App. 18a).

To be sure, portions of the 1976 Act constitute a significant revision of many aspects of the 1909 Act. However, when it came to the work for hire doctrine, Congress adopted what it considered to be a "basic" and "well established" principle of existing copyright law: "that in the case of works made for hire the employer is considered the author of the work" in the absence of a contrary agreement. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5736-37 ("1976 House Report"). The position of the Court of Appeals—that Congress in the 1976 Act maintained the "well established" work for hire doctrine but nevertheless "radically revised" well established judicial precedent defining the scope of that doctrine—is simply wrong.

1. *The 1976 Act's Distinction Between "Employee" Works And "Specially Ordered Or Commissioned" Works Is Based On Considerations Of Supervision And Control, Such As That Exercised By CCNV In This Case*

The genesis of the 1976 Act's work for hire provisions is found in a 1958 study prepared for Congress by Borge Varmer, on behalf of the Copyright Office. *Cf. Mills Music*, 469 U.S. at 159. Varmer distinguished between "employee" works, on the one hand, and "specially commissioned" works prepared by "independent contractors," on the other hand. According to Varmer, only employee works were regarded as works for hire under the 1909 Act, while commissioned works were not. Varmer explained the basis for this distinction as follows:

> [T]he common law generally has differentiated between the employer-employee relationship and that of the parties to a contract for a commissioned product: in broad terms, the acts of an employee as such are imputed to his employer, but those of an independent contractor are not imputed to the person for whom he performs a special commission. *Underlying this distinction is the premise that an employer generally gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor.* Perhaps in recognition of this principle, the statutory provisions in the United States regarding the employer's ownership of copyright in works made for hire, and the corresponding provisions in the copyright laws of several foreign countries, have not been extended to commissioned works generally.

B. Varmer, *Works Made for Hire and on Commission*, Copyright Office Study No. 13, 86th Cong., 2d Sess. 142 (Comm. Print 1960) (emphasis added) ("Varmer 1958 Study").

The Varmer Study was followed by the Register of Copyright's 1961 Report to Congress on the issues to be

addressed in copyright revision legislation. *Cf. Mills Music*, 469 U.S. at 159. The Register noted that the "rule has long been established, both under the common law and under the [1909 Act], that the rights in a work produced by an employee in the course of his employment are vested in the employer." According to the Register, this rule is based upon several grounds, including that the "*work is produced on behalf of the employer and under his direction.*" Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. 85 (Comm. Print 1961) ("Register's 1961 Report") (emphasis added).[8]

Neither the Varmer 1958 Study nor the Register's 1961 Report was considered in the Court of Appeals' opinion below, or in the *Easter Seal* opinion. As the reports suggest, however, the District Court's focus on CCNV's creative control and supervision is rooted not only in pre-1976 Act case law—but also in the very underpinnings of the work for hire doctrine and in the 1976 Act's distinction between "employee" works and "specially ordered or commissioned" works. *See also* Cambridge Research Institute, *Omnibus Copyright Revision: Comparative Analysis of the Issues* 102 (1973) (distinction between employee works and commissioned works in copyright revision legislation is "based on the belief that more direction and control can presumably be exercised over the efforts of his employee, than can be exercised over an independent contractor"). The focus on supervision and control also finds support in the policies underlying copyright generally.

[8] The other "grounds" noted by the Register were that the "employee is paid for the work" and the "employer, since he pays all the costs and bears all the risks of loss, should reap any gain." Register's 1961 Report at 85. In the present case, CCNV paid Reid $15,000 to cover the costs of producing "Third World America." Although Reid agreed to donate his services to CCNV, he received the compensation that he bargained for in terms of reimbursement of costs, widespread exposure of his work, and identification with a worthwhile cause. *See* 652 F. Supp. at 1457 (App. 36a).

Article I, Section 8 of the Constitution authorizes Congress to extend copyright protection to "Authors." This term has been construed broadly to mean "an 'originator,' 'he to whom anything owes its origin.'" *Goldstein* v. *California*, 412 U.S. 546, 561 (1973), *quoting Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 58 (1884). Where, as here, the employer not only "originates" the concept of a work but does so in "starkly specific detail" and then supervises, controls and pays for the implementation of that concept to ensure that the work is what he intends, the employer is properly regarded as the author who deserves the copyright reward. As Judge Friendly has observed:

> It is often said . . . that the essential factor in applying the "work for hire" doctrine is "whether the employer possessed the right to direct and to supervise the manner in which the work was being performed." See Nimmer, Copyright § 62.2. *Where the employer in fact tells the employee pretty much what to do, vesting copyright in the former is wholly consistent with the policy of the Copyright Act since the creativity can be said to be primarily the employer's and the employee has simply carried out his instructions.*

Scherr, 417 F.2d at 502 (dissenting opinion) (emphasis added).

The copyright reward, of course, "is intended to motivate the creative activity of authors." *Sony Corp* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). That reward is necessary to motivate an artist to undertake, on "speculation" and at his or her own economic risk, the production of an original work of art without the benefit of another's creative and financial support. Here, however, the artist's efforts have been procured, subsidized and closely supervised by CCNV members who, with the devotion of significant time and expense on their part, conceived and shaped the work in the manner which they, not Reid, wanted and in order to convey the message

which they, not Reid, intended. Reid has simply used his skills to implement the creative direction of the CCNV members, in the same way that Reid's dozen assistants used their skills to implement Reid's instructions. Under such circumstances, the policies underlying the work for hire doctrine and copyright, as the Varmer 1958 Study and the Register's 1961 Report recognize, generally contemplate that CCNV should receive the copyright reward.[9]

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[9] The District Court found that CCNV was the "motivating factor" behind "Third World America." 652 F. Supp. at 1456 (App. 35a). "[T]he philosophical justification for the 'work made for hire' exception is that the employer can actually be considered a kind of author; 'the motivating factor in producing the work was the employer who induced the creation.'" B. Ringer, *Renewal of Copyright*, Copyright Office Study No. 31, 86th Cong., 2d Sess. 140 n.245 (Comm. Print 1960) ("Ringer 1960 Study"), *quoting* Kupferman, *Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 Colum. L. Rev. 712, 716 (1944). Ringer notes that the force of this reasoning is somewhat "diminished" by one decision holding that "the employer need contribute nothing but money . . . ." *Id.*

Youngdahl, *Copyright Law and the Employment Relation*, 5 St. Louis U.L.J. 510, 529 (1959), *quoting* H. Howell, *The Copyright Law* 51 (1948), notes that the work for hire doctrine is "based on the consideration that the employer was the proximate cause of the work coming into existence, and therefore is to be deemed as contributing to the progress of science and the useful arts and subrogate to all rights of the real author."

See also Comment, *Literary Property and Contracts of Hire*, 5 DePaul L. Rev. 256, 257 (1956) (The drafters of the 1909 Act "saw the employee as being a tool in the hand of the employer, and that in actuality the employer was the real author in law. So, when the [1909] act speaks of the employer as being the author, it contemplates a contract of hire whereby the employer is to exercise some degree of control over the actions of the employee").

2. *Congress' Determination To Provide Separate Treatment For Commissioned Works In The 1976 Act Was Never Intended To Alter The Approach By Which The Pre-Act Courts Had Applied A Supervision And Control Standard To Determine The Existence Of An Employment Relationship*

The Varmer 1958 Study and Register's 1961 Report were followed by considerable debate over work for hire and related issues. *Cf. Mills Music*, 469 U.S. at 159-60. Artist organizations, on the one hand, and motion picture and publishing interests, on the other hand, advanced opposing views on a variety of such issues, including whether the work for hire doctrine should be retained; whether the employer should be considered the author or merely the copyright owner; whether works for hire should be included in the controversial termination provisions; whether the employer's rights should be limited as they are in the patent area under the "shop right doctrine"; whether commissioned works should qualify as works for hire and, if so, which commissioned works should so qualify and under what circumstances. There is absolutely no suggestion in the history of these debates that Congress intended to alter the settled judicial approach to defining a copyright employment relationship. To the contrary, this history confirms that Congress retained the supervision and control standard as the basis for distinguishing between "employee works" and "specially ordered or commissioned works."

First, the Register's 1961 Report at 87 recommended that Congress define "work made for hire" as a "work created by an employee within the regular scope of his employment." This definition, the Register suggested, would not include "works made on special commission." *Id.* at 86. Accordingly, in 1963, the Register presented a draft bill in which he suggested that Congress define a "work made for hire" as a "work prepared by an employee within the scope of the duties of his employment

but not including a work made on special order or commission." Preliminary Draft for Revised U.S. Copyright Law and Discussion and Comments on the Draft, 88th Cong., 2d Sess. 15 n.11 (Comm. Print 1964) ("1963 Preliminary Draft and Comments"). The Register did not define the terms "employee" or "special order or commission." However, as Barbara Ringer, who later became the Register of Copyrights, specifically noted during the discussions on the Register's 1961 Report:

> [W]ith respect to works made for hire, I think *the report in essence recommends that the present law be retained.* Under the present law, as you are very well aware, the employer has the right to secure copyright. The report recommends a somewhat more specific definition of what is a "work made for hire," but other than that would *leave the present law undisturbed.*

Discussion and Comments on Report of the Register of Copyrights, 88th Cong., 1st Sess. 144 (Comm. Print 1963) (emphasis added).

The state of the then "present law" on work for hire under the 1909 Act was set forth by Professor Melville Nimmer in the 1963 edition of his classic treatise on copyright law. Nimmer wrote, in essentially the same language that appears in the current edition of his treatise:

> The question then arises as to what constitutes an employment for hire. The nature of the compensation paid to the alleged employee is not necessarily determinative. Thus one may be an employee regardless of whether he is paid on the basis of a conventional periodic salary, on a piece work basis, on a fee or royalty basis, or even if the writing is done as an accommodation with no compensation at all. *The crucial question in determining an employment relationship is whether the alleged employer has the right to direct and supervise the manner in which the writer performs his work.*

Nimmer on Copyright § 62.2 (1963) (citations omitted) (emphasis added); *accord* 1 *Nimmer on Copyright* § 5.03 [B][1][a] at 5-12 to 5-13 (1988). The same view was advanced by at least one attorney who participated in the 1963 discussions of the Register's draft legislation: "The cases do hold that 'employment for hire' exists where there is a relationship of 'master and servant,' that is, where the person receives compensation and *is subject to control and regulation by the person for whom he performs the work.*" 1963 Preliminary Draft and Comments at 274 (remarks of Samuel Tannenbaum) (emphasis added). *See also* note 9 *supra.*[10]

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[10] Noting that cases which had arisen under the 1909 Act "involved salaried employees," Varmer wrote: "[I]t may be concluded that Section 26 [of the 1909 Act] refers only to works made by salaried employees in the regular course of their employment." Varmer 1958 Study at 130. None of the cases cited by Varmer, however, considered the question of whether an employment relationship exists where the artist is subject to supervision and control but does not receive a "salary." As noted above, Varmer proceeded to observe that it is supervision and control which determines the existence of an employment relationship. Varmer 1958 Study at 142.

In a companion Copyright Office study released two years after the Varmer 1958 Study, it was also noted that: "A regular salary is usually indicative of employment for hire. However, whether or not a work was 'made for hire' is not necessarily dependent upon whether it was prepared by an employee exclusively during regular working hours, or for a fixed salary." Ringer 1960 Study at 141 (citations omitted).

None of the reports of the Register of Copyrights or the Congressional committees made in connection with the 1976 Act ever mentioned Varmer's reference to salaried employees. The Register's 1961 Report implicitly recognizes that the class of copyright employees is much broader than simply salaried employees. *See* Register's 1961 Report at 86 (noting the "great variety of situations involved —in which the employment relations . . . differ widely").

See also B. Ringer & P. Gitlin, *Copyrights* 28 (1963) ("'For hire' in this context [*i.e.*, the 1909 Act] has been held to mean something broader than 'for salary' and narrower than 'on commission'") (citations omitted).

Second, the Register's recommendation to define "works made for hire" as "works prepared by an employee within the scope of the duties of his employment" was essentially non-controversial, and ultimately was incorporated into Section 101 of the 1976 Act without significant change. The controversy instead centered on the "commissioned works" portion of the Register's recommendation. The House Report notes that:

> The status of works prepared on special order or commission was a major issue in the development of the definition of 'works made for hire' in section 101, which has undergone extensive revision during the legislative process. *The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as 'works made for hire,' and those that should not.*

1976 House Report at 121 (emphasis added). While Congress, the Copyright Office and affected parties debated the issue of where to draw the line between qualifying and nonqualifying commissioned works, absolutely no issue was raised as to the basis for distinguishing between "employee works," on the one hand, and "commissioned works," on the other hand. No one challenged the supervision and control standard as a basis for making that distinction.

The commissioned works controversy was effectively resolved in 1965 when eight interested groups representing book publishers, music publishers and artists) entered into a compromise agreement covering a range of copyright issues. This agreement provided that the works typically commissioned by book publishers and music publishers would qualify as "specially ordered or commissioned works" and thus as "works for hire" (provided there was a written agreement to that effect). *See* Hearings on H.R. 4347 before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. (1965). This compromise agreement does not even mention "employee works," let alone suggest any new basis

for distinguishing between "employee works" and "specially ordered or commissioned works."

A House Judiciary Committee report accompanying one of the earlier copyright revision bills notes that: "After full consideration the committee decided to incorporate the substance and much of the language of this compromise in the bill." H.R. Rep. No. 83, 90th Cong., 1st Sess. 87 (1967). That portion of the compromise agreement dealing with works for hire was ultimately incorporated into subdivision (2) of the work for hire definition in the 1976 Act. Again, however, there is no suggestion in the committee reports or elsewhere that, by adopting a separate provision on "specially ordered or commissioned works," Congress intended to alter the standards for defining "employee works." [11]

Third, at the time of the compromise agreement the courts had "generally" not considered commissioned works to be works for hire under the 1909 Act. *See* 1961 Register's Report at 86. However, a line of cases had developed in which the courts applied a presumption that an independent contractor assigned his or her copyright to the hiring party. *See, e.g., Yardley* v. *Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940). These cases culminated with *Brattleboro Publishing Co.* v. *Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966), where the court held (one year after the compromise agreement) that it saw no reason why commissioned works should not come within the 1909 Act's work for hire doctrine; thus, in the absence of an agreement to the contrary, it would be presumed that an independent contractor was an employee for hire. As the Court in *Aldon* observed, this "presump-

[11] "[U]nlike a work prepared within the scope of employment . . . a commissioned relationship [for purposes of subdivision 2] may exist even if the commissioning party does not have the power to direct and supervise the manner in which the work is performed." 1 *Nimmer on Copyright* § 5.03[B][2][d] at 5-26 n.85 (1988).

tion applied to all works prepared by an independent contractor, regardless of the presence or absence of direction and ~~supervision~~ by the hiring party." 738 F.2d at 552.

Congress did not explain the effect of the 1976 Act on the *Brattleboro* line of cases. The court in *Aldon* has suggested that subdivision (2) of the work for hire definition changes the treatment accorded commissioned works. Petitioners agree that where the requisite supervision and control are lacking, a work for hire may be found only under subdivision (2). However, the 1976 Act does *not*, either explicitly or implicitly, repudiate the long-established supervision and control standard as the basis for distinguishing between "employee works" and "specially ordered or commissioned" works. *Aldon*, 738 F.2d at 552.

B. The District Court's Finding Of An Employment Relationship In The Circumstances Of This Case Is The Product Of A Fair And Reasonable Approach Which Best Effectuates The Constitution's Objectives For Copyright

1. *The Focus On Supervision And Control Avoids The Problems Inherent In Fractionalization Of Copyright*

Implicit in the analysis of the District Court below is the sound principle that only one party—the one who exercises creative control and supervision—is the copyright owner of the resulting work. Ignoring the significance of supervision and control in the copyright context, as the Court of Appeals has done, leads to a contrary and ill-advised result. Under the Court of Appeals' analysis, many or all of the parties who are subject to another's control in the production of a work may nevertheless qualify as joint copyright owners of that work (all with a duty to account to each other for any revenues earned from the work). 846 F.2d at 1498 (App. 27a). Indeed, finding the work for hire doctrine inapplicable, the Court of Appeals has remanded this case for a determination

of whether Reid's twelve or so "assistants" and others are joint owners of the copyright in "Third World America." 846 F.2d at 1499 (App. 28a). As the Court of Appeals recognized, the standard for determining whether a creative contribution qualifies for joint authorship is "not high"; the contribution is not required to be copyrightable itself. 846 F.2d at 1496 (App. 23a), *citing* 1 *Nimmer on Copyright* § 6.03 at 6-6 and § 6.17 at 6-18 (1988).

The approach of the Court of Appeals in the present case—to invoke the joint work doctrine as an alternative to work for hire—implicitly recognizes that CCNV deserves to be an author and thus copyright owner of "Third World America"; if CCNV were not, it could be held liable for infringing the very work which it conceived, nurtured, directed and paid for. The Court of Appeals, however, attempts to avoid such an inequitable result by blurring what should be a fundamental distinction between a work for hire and a joint work. A joint work is the product of the joint efforts of two or more parties, none of whom is subject to the control of his or her creative partner(s). Here, Reid was subject to CCNV's control, just as Reid's assistants were subject to his and CCNV's control (and thus, in CCNV's view, ineligible for author status). Fractionalization of the copyright is simply not a proper or viable alternative to the work for hire doctrine in those cases where the artist has ceded creative control to the employer.[12]

CCNV has expended a considerable amount of creative and financial resources to develop what was intended to

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[12] The Court of Appeals' ruling on joint works is not before the Court. *See* page 13, *supra*. If the judgment of the Court of Appeals is affirmed, CCNV will press its argument before the District Court on remand that, at the very least, it is a joint author of "Third World America." The point here is that by discarding the supervision and control standard, the Court of Appeals has necessarily invited the significant problems that flow from fractionalization of copyright.

be the symbol with which it and its cause would be identified. Under the Court of Appeals' analysis, however, Reid, all of Reid's assistants and others may have rights in the symbol which they were paid by CCNV to produce; and CCNV may obtain exclusive rights to that symbol only by successfully negotiating with all of those parties. Imposing such a burden upon the employing party to identify and to negotiate with all of the contributors to a work—even though they were supervised and paid by the employing party—is counterproductive to sound copyright policy and could not have been intended by Congress. *See* 1961 Register's Report at 86 (rejecting artists' proposal to apply "shop right" doctrine to works for hire on ground that, *inter alia*, the "proposal would be unworkable in the common situation where a work is the composite product of many employees").[13]

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[13] The Court of Appeals expressed a concern with ensuring predictability and certainty as to the identity of copyright owners of a particular work. 846 F.2d at 1494 (App. 18a). It is unlikely that Congress, which chose to use the unadorned term "employee" in the face of repeated judicial pronouncements about the imprecision of that term, intended a precise definition. Furthermore, the adoption of the Restatement agency law approach does not provide any greater certainty than the *Aldon* control test. *See Hearst*, 322 U.S. at 121. In fact, by permitting multiple parties to claim copyright in a single work, without regard to whether their efforts were controlled by another, the Court of Appeals has adopted an approach which will cause significant uncertainty as to the identity of the copyright owners of a work. Even if the hiring party has the foresight to negotiate a copyright assignment from the party with whom it deals, it will not have any protection against other (often unknown) parties who may have dealt with that party and made the minimal contribution necessary for joint authorship status under the Court of Appeals' approach. *See* 1961 Register's Report at 86 (rejecting artists' proposal to apply "shop right" doctrine to works for hire on grounds that, *inter alia*, it "would often be difficult for potential users to know whom to deal with").

2. *The Focus On Supervision And Control Is Fair To Both Employers And Artists*

The Court of Appeals attempted to support its analysis on the basis of Congress' "general concern that creators receive fair recompense." *See* 846 F.2d at 1494 (App. 18a). But the work for hire provisions of the 1976 Act represent a "carefully balanced compromise," 1976 House Report at 121, in which Congress clearly manifested a concern for those who employ artists. Various proposals that would have expanded artists' rights at the expense of employers were squarely rejected. *See* Petition for Writ of Certiorari at 20-21; page 25 *supra*. On the other hand, the artists' positions on certain issues, such as limiting the categories of works in subdivision (2), were accepted. Thus, it is wrong to construe the work for hire provisions in a way that is designed to arbitrarily favor artists over employers—or vice versa.

Focusing upon all the circumstances surrounding the parties' relationship with particular regard to supervision and control, as the District Court below and the Second Circuit in *Aldon* did, reflects a fair, balanced and flexible approach—an approach which does not inherently favor any one class (employers or artists) over the other. Artists have claimed that some degree of supervision and control is always present in the relationship between an employer and an artist; thus, they contend, the control test will restrict their rights. But this claim is belied by the judicial history of the work for hire doctrine. Indeed, in several pre- and post-1976 Act cases the courts have found that the hiring party did *not* exercise sufficient supervision and control to gain the status of "employer" under the Copyright Act.[14] While that is cer-

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[14] In the following cases the courts concluded that no employment relationship existed because the requisite supervision and control were not present: *Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987); *Epoch Producing Corp.* v. *Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975), *cert. denied*,

tainly not the situation here, it has been, and surely will be, in other cases.

3. *The Focus On Supervision And Control Promotes Broad Public Availability Of Creative Works*

Any construction of the work for hire provisions must also take account of Section 105 of the Copyright Act, 17 U.S.C. § 105. Section 105 provides that: "Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise." Section 101 defines a "work of the United States Government," in language comparable to that found in the work for hire provision, as "*a work prepared by an officer or employee* of the United States Government as part of that person's official duties." 17 U.S.C. § 101 (emphasis added). Congress made clear that: "Although the wording of the definition of 'work of the United States Government' differs somewhat from that of the definition of 'work made for hire,' the concepts are intended to be construed in the same way." 1976 House Report at 58. Consequently, the approach adopted by the Court in this case will likely determine the extent to which works are made available to the public under Section 105 of the Copyright Act.

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424 U.S. 955 (1976); *Donaldson Publishing Co.* v. *Bregman, Vocco & Conn, Inc.*, 375 F.2d 639 (2d Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968); *Sandwiches, Inc.* v. *Wendy's Int'l, Inc.*, 654 F. Supp. 1066 (E.D. Wisc.), *appeal dismissed*, 822 F.2d 707 (7th Cir. 1987); *Hudson* v. *Good Rush Messenger Services, Inc.*, Copyright L. Rep. (CCH) ¶ 26,089 (S.D.N.Y. 1987); *Joseph J. Legat Architects, P.C.* v. *United States Dev. Corp.*, 625 F. Supp. 293 (N.D. Ill. 1985); *Sygma Photo News, Inc.* v. *Globe Int'l, Inc.*, 616 F. Supp. 1153 (S.D.N.Y. 1985); *Olympia Press* v. *Lancer Books, Inc.*, 267 F. Supp. 920 (S.D.N.Y. 1967). The district court in *Easter Seal* also found that the hiring party failed to meet the *Aldon* control standard. *See* note 17 *infra*.

"The effect of Section 105 is intended to place all works of the United States Government, published or unpublished, in the public domain." 1976 House Report at 59; *see also Public Affairs Associates, Inc.* v. *Rickover*, 284 F.2d 262, 268 (D.C. Cir. 1960), *vacated on other grounds*, 369 U.S. 111 (1962) (provision in 1909 Act comparable to Section 105 of the 1976 Act "is designed to achieve in a democracy that depends upon accurate public knowledge the broadest publicity for matters of government"). This purpose is consistent with the public welfare objective of the Constitution's copyright clause.[15] It would surely be defeated by an overly restrictive interpretation of the term "employee" in the work for hire provisions. Where Government personnel (at taxpayers' expense) supervise and control the production of a work by a private party (as CCNV supervised and controlled Reid's efforts), that work should be treated as a "work of the United States Government"—and, in accordance with Section 105 of the Act, it should be made broadly available to the public.

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[15] The overriding constitutional objective of copyright law is to encourage the widest possible availability of creative works to the public. As the Court indicated in *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), "ambiguities in the law of copyright" must be resolved with reference to the principle of serving the "general public good." "'Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.'" *Id.* at 431-32, *quoting Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975). In the present case, CCNV has the greatest incentive and is in the best position to maximize the broad public availability of "Third World America." Indeed, CCNV had the work produced for precisely that purpose. *See* pages 4-5 *supra*.

II. EVEN IF COPYRIGHT EMPLOYMENT IS DETERMINED BY REFERENCE TO AGENCY LAW, THE COURT OF APPEALS ERRED IN FAILING TO REMAND THIS CASE TO THE DISTRICT COURT ON THE WORK FOR HIRE ISSUE

Virtually the entire work for hire section of the Court of Appeals' opinion below is devoted to a discussion of the conflicting judicial approaches. At the end of its discussion, the Court of Appeals adopts the agency law approach and, citing certain of the Restatement (Second) of Agency ("Restatement") § 220 (1958) factors, summarily concludes that: "Reid was an independent contractor and not an employee of CCNV within the rules of agency law." 846 F.2d at 1494 & n.11 (App. 19a). On this basis, the Court of Appeals reversed the District Court's finding of an employment relationship.

The question of whether an agency law employment relationship exists, however, is a question for the trier of fact. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964); *Ward* v. *Atlantic Coast Line R.R. Co.*, 362 U.S. 396, 400 (1960); *Baker* v. *Texas & Pacific Ry. Co.*, 359 U.S. 227, 228 (1959); *Bernstein* v. *Universal Pictures Inc.*, 517 F.2d 976, 980 (2d Cir. 1975). At the very least, therefore, the Court of Appeals should have remanded this case to the District Court for a consideration of the facts in light of the newly announced agency law standard (as it did on the joint work issue). Such a procedure is particularly warranted in this case because both CCNV and Reid had espoused the *Aldon* standard before the District Court. *See* page 10 *supra*. Thus, the District Court, which conducted a two-day bench trial, has never had the opportunity to consider whether an employment relationship existed under agency law principles.

The situation here is analogous to that in *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318 (1974) ("*Kelley*"). The court of appeals in *Kelley* concluded that the district court had applied an erroneous legal standard for purposes of determining the existence of an employment relationship under the Federal Employees Liability Act. The Supreme Court agreed with the court of appeals' new standard, but remanded so as to "require the trier of fact to re-examine the record in light of the proper legal standard." 419 U.S. at 332; *see Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-92 & n.22 (1982) ("*Pullman*"); *Mandel* v. *Bradley*, 432 U.S. 173, 178-79 (1977); *Malat* v. *Riddell*, 383 U.S. 569, 571 (1966). To be sure, a remand is not necessary where the "record permits only one resolution of the factual issue." *Pullman*, 456 U.S. at 292. But plainly this is not a case where the "only resolution" of the issue is a finding that CCNV and Reid did not have an agency law employment relationship. Indeed, if anything, the contrary is true.

First, although not mentioned by the Court of Appeals, the Restatement adopts "control" as the relevant standard for determining the existence of an employment relationship. Subsection (1) of Section 220 of the Restatement specifically provides: "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is *subject to the other's control or right to control*." (Emphasis added). The Court of Appeals offered no explanation as to the nature of the differences which it apparently perceived between the *Aldon* control standard—which it found to be satisfied in the circumstances of this case (846 F.2d at 1497 n.18 (App. 25a))—and the Restatement control standard.[16]

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[16] The Second Circuit in *Aldon* did not specifically refer to the Restatement control standard. However, the court did state that "it is necessary to look at the general law of agency as applied by prior copyright cases in applying subdivision (1) under the new [Copyright] Act." *Aldon*, 738 F.2d at 552. 1 *Nimmer on Copyright* § 5.03[B][1][a] at 5-13 to 5-15 & n.25.3 (1988) indicates that the *Aldon* supervision and control test is "merely a *particular application* of the general agency doctrine relating to master and servant." (Emphasis added).

The District Court below did note that the "employment relationship giving rise to a copyright is somewhat more expansive than the master-servant relationship found in the common law of agency." 652 F. Supp. at 1456 (App. 35a). However, given the record below and the findings of the District Court, it cannot properly be said—as a matter of law—that Reid and CCNV failed to establish an agency law employment relationship.[17]

Second, in reaching its agency law conclusion, the Court of Appeals elevated some of the several factors which are set forth in the second subsection of Section 220 of the Restatement to be the standards themselves—rather than examples of factors which may be useful in determining whether the control standard has been met. According to the Court of Appeals, a consideration of these factors demonstrates that Reid was not an agency law employee of CCNV. *See* 846 F.2d at 1494 n.11 (App. 19a). But the factors in Section 220(2)

> *are merely evidentiary indicia of the right to control.* Where, as here, there is ample independent evidence that the employer has the right to control the actual details of the writers' work and that it exercises this right, the fact that, for example, the employee is paid by the job rather than by the hour appears to be of minute consequence.

Tieberg v. *Unemployment Insurance Appeals Board*, 88 Cal. Rptr. 175, 471 P.2d 975, 982 (Cal. S.Ct. 1970) (en banc) ("*Tieberg*") (emphasis added).[18] *See also Ma-*

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[17] The situation here is quite different than that in *Easter Seal*. The district court in *Easter Seal* had ruled that the hiring party failed to meet the *Aldon* control test. 815 F.2d at 333. Thus, the Fifth Circuit was justified in concluding that an agency law employment relationship did not exist under the facts of that case.

[18] The court in *Tieberg* unanimously affirmed a lower court judgment that "free-lance" writers of certain television shows are "employees" of the producers of those shows (for purposes of the

honey v. *United States*, 216 F. Supp. 523, 528 (E.D. Tenn. 1962) (Restatement factors "looked to only to aid in determining" whether the control standard has been satisfied); *Franklin* v. *Puget Sound Tug & Barge Co.*, 21 Wash. App. 517, 586 P.2d 489, 493 (1978). Because the record contained substantial evidence demonstrating CCNV's control over Reid's efforts, the perceived absence of certain Section 220(2) factors should not have been accorded decisional significance by the Court of Appeals.

Finally, the few facts cited by the Court of Appeals fail to support its conclusion that an agency law employment relationship did not exist between CCNV and Reid, particularly when considered in light of the totality of the circumstances of this case. For example, the Court of Appeals emphasized that Reid "donated his services." 846 F.2d at 1494 n.11 (App. 19a). Section 225 of the Restatement, however, provides: "One who volunteers services without an agreement for or expectation of reward may be a servant of the one accepting such services." Where control is present, the courts have found those who donate their services to be agency law employees. *See, e.g., In re Read's Petition*, 224 F. Supp. 241, 246-47 (S.D. Fla. 1963); *Bond* v. *Cartwright Little League, Inc.*, 112 Ariz. 9, 536 P.2d 697, 701-03 (1975); *Duffy* v. *Harden*, 179 N.W.2d 496, 502-03 (Iowa S.Ct. 1970). The same result has been reached in the copyright context as well. *See* 1

California unemployment insurance law). The court did so, applying the Restatement control test and notwithstanding the facts that the writers "worked on their own time, at their own expense, in their own way, with their own instrumentalities, and at a place of their own selection"; that the producers did not employ the writers on any regular or continuous basis and did not enjoy their exclusive services, but simply paid the writers on a per-work basis; and that each writer "conceive[d] and develop[ed] his own ideas" for the stories and then presented them to the producers. *See also Ringling Bros. & Barnum & Bailey Combined Shows, Inc.* v. *Superior Court*, 140 Ariz. 38, 680 P.2d 174, 178 (1984).

Nimmer on Copyright § 5.03[B][1][a] at 5-12 to 5-13 & n.17 (1988).[19]

III. THE TERM "EMPLOYEE" IN THE WORK FOR HIRE DOCTRINE IS NOT NARROWLY CONFINED TO FORMAL, SALARIED EMPLOYEES; EVEN IF IT WERE, THE DISTRICT COURT'S JUDGMENT SHOULD NOT HAVE BEEN REVERSED

A number of artist groups appeared together as amicus before the Court of Appeals below, and argued that the term "employee" in the 1976 Act should be confined to "formal, salaried employees who receive traditional employment benefits." This view has never been adopted by any of the circuits, and was expressly rejected by the Fifth Circuit in *Easter Seal* and the Second Circuit in *Aldon*. However, it has been incorporated in certain bills which Senator Cochran (D-Miss.) introduced into the

[19] The other facts cited by the Court of Appeals also fail to support its conclusion. *First*, Reid may have "worked in his own studio," but CCNV paid to maintain that studio during the CCNV project. *See* Restatement § 220(2)(e) (relevant inquiry is who "supplies" "place of work"). *Second*, Reid may have "personally engaged" certain assistants, but all of them were paid, in accord with the agreement between CCNV and Reid, with CCNV funds. Furthermore, perhaps the most important of these assistants—Tom Lewis, the artist active in the homeless cause—was originally contacted by CCNV about the "Third World America" project and served as CCNV's liaison with Reid. *Third*, while "creating sculptures" is not CCNV's "regular business," the supervising of creative work designed to benefit the homeless is an essential part of CCNV's regular activities. *Cf. Tieberg*, 471 P.2d at 982 n.8.

The Court of Appeals also said it "did not understand CCNV to contend" that Reid was an employee under agency law. CCNV, however, maintained throughout the proceedings before the District Court and Court of Appeals that Reid was CCNV's employee by virtue of CCNV's control over Reid's efforts. Control is the relevant criterion under agency law. *See also* 846 F.2d at 1492 n.10 (App. 14a) (permitting Reid to advance agency law standard even though he had relied upon *Aldon* standard before District Court).

99th and 100th Congresses.[20] Neither of these bills has had any cosponsors and neither was reported out of committee, although it appears that Senator Cochran has been promised a hearing during the next Congress. *See* 134 Cong. Rec. S14563 (daily ed. October 5, 1988) (statement of Senator DeConcini).

Petitioners understand that the artist organizations will submit their "formal" employee theory to the Court in the present case. Petitioners will respond, in their closing brief, to the artists' specific arguments as may be necessary. However, Petitioners note that, for the reasons already discussed in Section I above, Congress never intended to restrict the term "employee" in the 1976 Act to "regular, salaried employees"; moreover, the policies underlying work for hire specifically and copyright generally are not served by replacing the standard of creative supervision and control with a "salary" standard.

Two additional points also should be noted. *First*, when originally asked by Congress to comment on the artists' salaried employee amendment, the Copyright Office made clear that Congress, in the 1976 Act, did not restrict an employment relationship to "regular salaried" employment. According to the Copyright Office, the determina-

[20] S. 1223, 100th Cong., 1st Sess. (1987); S. 2330, 99th Cong., 2d Sess. (1986). Two of the artist organizations who participated in the amicus brief below appeared before Congress in 1982 and testified that, under the 1976 Act *as it was enacted and currently reads*, "essentially, common law standards for distinguishing between an employee and an independent contractor must be used" for determining the applicability of the work for hire doctrine. They argued, however, that this approach "causes great uncertainty." Accordingly, they urged Congress to *amend* the 1976 Act by confining the term "employee" to "salaried employee." *Hearings Before the Senate Comm. on the Judiciary on S. 2044*, 97th Cong., 2d Sess. 40-41 (1982) (supplemental testimony of the American Society of Magazine Photographers and the Graphic Artists Guild).

tion of what constitutes an employment relationship under the 1976 Act's work for hire doctrine is left

> to private contractual relations as interpreted by courts under the general law of agency. . . . A long history of case law, on which industry and employment practice rely, defines those works which are or are not prepared as part of the employee's duties. The nature of compensation paid to the employee is not always determinative. Thus, as stated in NIMMER ON COPYRIGHT § 5.03(B) (1982 Supp.),
>
> > ". . . [o]ne may be an employee regardless of whether he is paid on the basis of a conventional periodic salary, on a piece work basis, on a fee or royalty basis, or even if the writing is done as an accommodation with no compensation at all. *The crucial question in determining an employment relationship is whether the alleged employer has the right to direct and supervise the manner in which the writer performs his work.*" (Case citations omitted).

Letter from Dorothy Schrader, Associate Register of Copyrights for Legal Affairs, to Senator Thad Cochran at 4 (January 25, 1983) (reproduced in the Appendix hereto at 6a) (emphasis added). The Copyright Office stated that, as a matter of policy, it would probably not favor the salaried employee amendment because the existing judicial approach "allows for accommodation to longstanding business practices" and because that approach had not resulted in any "body of proven abuses or inequities." *Id.*[21]

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[21] The Copyright Office did characterize its views in the above-mentioned letter as "preliminary"—although it is unclear whether this referred to the Copyright Office's policy recommendations (*i.e.*, that a salaried employee amendment not be adopted) or its interpretation of the 1976 Act (*i.e.*, that the term "employee" is defined by reference to considerations of supervision and control and is not limited to salaried employees). In any event, the guidance which the Copyright Office has provided to the public on this issue—

Second, CCNV and Reid entered into a relationship characterized by essentially the same facts that characterize any other "regular salaried" employment relationship. CCNV paid Reid's expenses and closely supervised and directed Reid's efforts while he worked full-time during a seven-week period to meet CCNV's deadline and comply with CCNV's instructions. Throughout this period Reid was not treated any differently than any CCNV member who undertakes a particular CCNV project to benefit the homeless. To be sure, Reid did not receive a "salary" as such; he voluntarily waived any claim to direct compensation other than reimbursement for what he considered his "costs." However, there is no reason to believe that Congress intended the mere payment of a salary and employment benefits (both of which could, even under the salaried employee theory, be quite minimal) to have any greater copyright significance than the providing of other forms of compensation that were given Reid (such as widespread exposure of the work and identification with a worthwhile cause). *See* 1 *Nimmer on Copyright* § 5.03[B][1][a] at 5-12 to 5-13 & n.17 (1988).

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guidance which influences industry practices—is squarely contrary to the salaried employee theory. *See* Compendium (II) of Copyright Office Practices § 615.04(a) (February 1988) (Copyright Office will not question, for purposes of registering a work for hire, an "application where it appears that an unpaid volunteer contributed to a work made for hire"); Copyright Office Circular R-9 (December 1985) ("[T]he law does not define 'employee' or 'scope of employment.' In the absence of definitions of these terms or much case law bearing on the issue, general principles of agency law may apply . . . . Under the principles of agency law, consideration is given to the amount of supervision and control exercised by the employer. The nature of compensation may also be a factor although it is not necessarily a determining element").

CONCLUSION

The Court of Appeals erred when it reversed the District Court and concluded that the work for hire doctrine is inapplicable in the circumstances of this case. The judgment of the Court of Appeals, therefore, should be reversed. Alternatively, if the Court concludes that the District Court applied an incorrect legal standard, this case should be remanded to the District Court with instructions to consider the applicability of the work for hire doctrine to the facts of this case under the proper standard.

Respectfully submitted,

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December 22, 1988

APPENDIX

APPENDIX

January 25, 1983

The Honorable
Thad Cochran
United States Senate
321 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Cochran:

This responds to your request for comments by the Copyright Office on the testimony at the Senate Judiciary Committee's October 1, 1982 hearings on the work made for hire provisions of the Copyright Act and specifically on the supplemental legislative proposals of the American Society of Magazine Photographers and the Graphic Artists Guild for amending those statutory provisions.

The Register of Copyrights regrets that his schedule (submission of a report to Congress on library photocopying, and participation in a New Delhi meeting on development cooperation between developed and developing countries) has not allowed him sufficient opportunity to review the work for hire proposals in depth. He has, however, authorized me to express the tentative preliminary views of the Copyright Office in response to your request. The Register anticipates further study of these issues, which may lead to modification of the tentative views herein expressed.

The Copyright Office shares your views that the purpose of the work for hire provisions of the Act is to protect the rights of authors and creators while providing to publishers the usage rights they need. This, of course, was the avowed intention of Congress throughout the lengthy consideration of the work for hire provisions during the more than a decade-long effort to revise the copyright law generally. As the record shows, all parties concerned received repeated opportunities to present their views to Congress throughout this revision process. How-

ever, although the new Act gave artists and other creators substantially strengthened legal protection in potential work for hire situations, the Copyright Office supports the continued efforts of Congress, through forums such as the October hearings, to keep abreast of trade practices that reveal how the law is operating. The relationship between creators of copyrighted works and the entrepreneurs, including publishers, broadcasters, motion picture producers and others who risk capital to further the dissemination of those creative works, is a significant matter of continuing concern.

Testimony at the October hearings elicited the views of illustrators, magazine photographers, and authors, and of magazine, textbook and business publishers, and motion picture producers on your bill, S. 2044 (97th Cong., 2d Sess. (1982)). That bill would amend the copyright law's definition of a "work made for hire" by excluding contributions to collective works, motion pictures and other audiovisual works, and instructional texts from the § 101(2)[1] category of commissioned works that may be considered works made for hire provided a written agreement to that effect is signed by both parties. At the hearing, creators argued in favor of the bill, arguing that publishers presently force creators to sign work for hire agreements, depriving them of all control over subsidiary rights to their great economic detriment. Publishers, on the other hand, stressed that the law as written represents a well-considered compromise that contains built-in author safeguards which should be allowed to stand. They say the vast majority of authors are fairly treated by publishers who assume the financial risk of disseminating creative works, and that to upset the legislative scheme would seriously impair publishers' ability to obtain the clearances necessary to market works. For-hire agreements, they say, are voluntary; and contract negotia-

[1] The 1976 Copyright Act, title 17 of the U.S. Code, §§ 101 et seq. All references to sections of a statute refer to this Act.

tions, rather than statutory amendments, should be relied upon to solve isolated problems.

At the hearings, and by a supplemental submission to the Judiciary Committee, the Graphic Artists Guild (and the American Society of Magazine Photographers) argued for an additional statutory amendment of the works for hire provision, going well beyond that embodied in S. 2044.

GAG argues that "in practice, work for hire has been used to secure [the exclusive rights constitutionally intended to benefit authors] . . . for commissioning parties instead of the true free-lance creator." They say that, in the case of commissioned works, the financial risk assumed by the publisher is minimized by the artist's risk. Commissioned photographers, they argue, are not paid prior to the commencement of an assignment. Their work product must be satisfactory to the publisher, and the artist must indemnify the publisher against risks of copyright infringement. The artist must supply his equipment and bear his own overhead costs. In short, they argue, commissioned photographers do not enjoy employee benefits; and, the photographer is principally responsible, creatively and financially, for the existence of his creative work. In addition, they argue that, while these independent creators do not enjoy traditional employee benefits, they are legally precluded from bargaining collectively.

The Graphic Artists Guild proposes amendments to alleviate the perceived plight of these creators. As you know, my staff and I have discussed these proposals informally with your staff. I shall discuss each of the GAG proposals separately, explaining the provisions of the statute as written with brief references to legislative history, and then comment upon the projected effect of each proposed amendment.

I. *When Must a Work For Hire Contract be Signed.*

GAG argues that, contrary to the intent of the 1976 Copyright Act, publishers frequently demand work for hire contracts after a work assignment is underway or completed. They propose amending the law to enable commissioned works to be considered works made for hire only if the parties so agree in a written instrument signed "prior to the commencement of any work."

Section 101(2) of the Copyright Act presently states that any of the enumerated categories of specially ordered or commissioned works may be considered as a work made for hire "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." Although the law does not specify a time frame within which work for hire agreements must be signed, legislative history, cited by the Guild in its supplemental statement, clearly establishes the drafters' intent that such agreements should not be permitted after the work was written. Thus, the Office probably would support the proposed amendment in principle. However, we believe it unnecessarily restricts the scope of commissioned works for hire by providing that once "any work" has begun, the resulting piece could never be considered a commissioned work for hire. The proposal is so broad that, conceivably, even if an author had jotted down an idea or theme, his or her work would be legally barred from being considered a commissioned work for hire.

In our view, a more appropriate amendment to accomplish the intended purpose of prohibiting publishers from extracting work for hire agreements for completed works, or those that require only minor editorial revisions, would foreclose creation of a substantial part of the work before execution of the written agreement, if the work is to be deemed one made for hire.

II. *Ownership of the Physical Work of Art.*

GAG argues that creators of works made for hire should be presumed to have retained property rights in their (often valuable) original creations, and that the law should be amended to provide that, absent a written transfer of property rights in the material object, a work for hire agreement conveys no rights in the material object.

Section 202 presently reflects the traditional copyright law presumption that the author (including the employer in the case of works made for hire) owns distinct rights both in the physical property and the literary or artistic property. This is a fundamental principle of the new Copyright Act, whose retention would probably be favored by the Copyright Office.

If the GAG amendment were adopted, the "author" of commissioned works made for hire (*i.e.*, the commissioning party would be required to obtain ownership of both the physical work and the copyright in order to exploit the work. Otherwise, he might be held to common law bailee duties with respect to the physical object. And, the amendment would blur the § 202 distinction between physical and intellectual property, leaving unclear what rights of use are enjoyed by the owner of the physical property of a copyrighted work.

III. *Who is An Employee.*

GAG argues that the law presently leaves unclear who is an employee for purposes of § 101, to the detriment of non-salaried creators such as those paid on a fee basis or in royalty form, who might still be regarded as employees under case law. It proposes amending the § 101(1) definition of employees to restrict the definition to "salaried employee(s)" to prepare works within the scope of their employment.

The present law defines all works prepared by an employee within the scope of employment as works made for hire. § 101. The statute does not define when a work is made "within the scope of employment," but leaves that determination to private contractual relations as interpreted by courts under the general law of agency. The principle of the employer being regarded as the author of works made for hire is basic, and dates back beyond the 1909 copyright law. Copyright Law Revision Study 13, S. Judiciary Comm. Print (1960). A long history of case law, on which industry and employment practice rely, defines those works which are or are not prepared as part of the employee's duties. The nature of compensation paid to the employee is not always determinative. Thus, as stated in NIMMER ON COPYRIGHT § 5.03(B) (1982 Supp.),

> ". . . [o]ne may be an employee regardless of whether he is paid on the basis of a conventional periodic salary, on a piece work basis, on a fee or royalty basis, or even if the writing is done as an accommodation with no compensation at all. The crucial question in determining an employment relationship is whether the alleged employer has the right to direct and supervise the manner in which the writer performs his work." (Case citations omitted).

Because this provision allows for accommodation to long-standing business practices, which are always subject to the substantial historical body of case law, and in the absence of a body of proven abuses or inequities (even the *Aitken* case cited in GAG's statement held the architect in question was not an employee), the Copyright Office probably would not favor amending the law at this time.

IV. *Categories of Commissioned Works that May Qualify as Works for Hire.*

GAG proposes amending clause (2) of the present statute's § 101 definition of specially commissioned works

that may qualify as works made for hire to exclude contributions to collective works, audiovisual works other than motion pictures, supplementary works, instructional texts, and atlases other than "bound collections of maps." None of these commissioned works could qualify as works made for hire under the GAG proposal.

The present law contains significant safeguards for both creators and exploiters of collective works. It defines periodical issues, anthologies, and encyclopedias that consist of a number of contributions constituting separate and independent works assembled into a collective whole as "collective works." § 101. Section 201(c) provides that "copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution." Absent an express transfer of copyright, the owner of copyright in the collective work is presumed to have acquired "only the privilege of reproducing and distributing the contribution as part of that collective work, any revision of that collective work, and any later collective work in the same series." This provision does not change the rights of copyright ownership in collective works under the previous copyright law; but, it does clarify the legal situation with respect to rights in individual contributions. It emphasizes the principle that copyright in the individual contribution is separate from copyright in the collective work. Further, it confirms that the author of the contribution is the first owner of copyright in it, and that the author of the collective work owns rights in such elements as selection, arrangement and assembly of a number of contributions. Absent an employment for hire agreement, or an express transfer of more, the owner of a collective work is presumed to acquire only first reproduction rights and the right to reproduce and distribute the contribution as part of a revision or of a later collective work in the same series.

A complementary provision found in § 404 preserves the author's copyright in a contribution even if the contribution does not bear a separate notice in the author's rights to the owner of the collective work. In the past, publishers have resisted putting separate copyright notices on contributions. If the author had not transferred all rights to the publisher, he or she risked losing copyright if a court found the general notice in the publisher's name inadequate to protect the individual contribution. The new copyright statute clarifies the situation to the author's advantage by permitting a single notice in a collective work to cover copyright in particular contributions. It preserves the author's copyright in his or her contribution even in the absence of a transfer of all rights to the publisher or owner of copyright in the collective work. § 404(a).

The equities balanced by Congress in achieving these statutory provisions are discussed more fully in House Report 94-1476 [2] at 122:

> The basic presumption of section 201(c) is fully consistent with present law and practice, and represents a fair balancing of equities. At the same time, the last clause of the subsection, under which the privilege of republishing the contribution under certain limited circumstances would be presumed, is an essential counterpart of the basic presumption.

Similarly, the House Report alludes generally to the delicate compromise reflected in defining specially commissioned works, including supplementary works, as ones capable of being works made for hire by written agreements:

> The status of works prepared on special order or commission was a major issue in the development of the definition of "works made for hire" in section

[2] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976).

> 101, which has undergone extensive revision during the legislative process. The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as "works made for hire," and those that should not. The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered "works made for hire" under certain circumstances. H.R. Rep. No. 84-1476 at 121.

GAG's proposal would upset these compromises by excluding contributions to collective works, as well as visual works other than motion pictures from the possibility of qualifying under the statute as commissioned works for hire. In addition, it creates further complications by separating motion pictures from audiovisual works, a category that currently includes motion pictures as well as other works that consist of a series of related images intended to be shown by the use of projectors or like devices.

And, the GAG proposal goes farther by giving contributions to compilations, supplementary works, instructional texts and audiovisual works other than motion pictures a new statutory presumption, similar to that extant under § 201(c), that, absent other agreements or transfers, the owner of copyright in the larger work acquires only the right to reproduce and distribute these aforementioned works as part of the larger work and any revisions of it.

Moreover, GAG's proposal would require any express transfer of an author's work in any of these categories to enumerate the rights being transferred; any of the rights not exercised within two years would become nonexclusive with respect to the publisher, and the author would be able to resell such rights on a nonexclusive basis.

Finally, the amendment would allow an author to waive his or her termination rights for these categories of

works if the parties have agreed (in writing, before commencement of the work) that they will be nonterminable.

The Copyright Office would probably take the position that this proposal is unwarranted. It creates a statutory presumption that all works that may presently be commissioned as works for hire other than translations, tests, and certain atlases, have been prepared in an individual capacity rather than as works made for hire. Absent an advance waiver of termination rights, the individual author of any such contribution would be the initial owner of copyright; and the term of copyright protection in such work would be measured by each individual author's lifetime and would be subject to the individual's right to terminate that transfer. Clearance and reprint rights procedures for publishers, who commonly sign "for hire agreements," again the subject of much congressional consideration,[3] would be vastly complicated, and business practices would have to be drastically altered.

Even more radical is the practical nullification of all-rights publishing contracts by the two-year exercise proviso. If a publisher, for example, published a work but failed to sell foreign rights within two years, the author would then be free to resell them. The author could duplicate profits from the sale of a single right, and the publisher could lose the benefit of its bargain, for which it had paid. This would represent a major change from existing business practice by which a publisher acts as a clearinghouse for subsidiary rights, often on behalf of the author. By creating added problems of clearance, it would adversely affect educators and other users. Finally, the Copyright Office suspects it might ultimately prove to be an unintended detriment to authors, for publishers would undoubtedly pay less for purported all-rights contracts knowing that some rights

[3] *See* H.R. Rep. No. 94-1476 at 124.

might well prove nonexclusive. And, publishers would have little incentive to assume the financial liability of promoting the sale of subsidiary rights given the risk that publisher benefits from such sales might be lost if negotiations were not successful within two years.

V. *Unconscionable Tranfers.*

Finally, the GAG redraft would amend § 201 by adding a new subsection (f) to permit a court to terminate or reform any transfer *at any time* if it proves "unfair or grossly disadvantageous to the author."

The Copyright Office's tentative view is that this proposal is inequitable to publishers who assume the substantial financial risks of publishing and marketing copyrighted works. It applies across the board to all copyrighted works and could preclude publishers from enjoying anything beyond marginal profits from their publishing contracts.

Conclusion.

In conclusion, because the proposed GAG redraft alters the delicate author-employer balance which was recently achieved (after much legislative debate) in the 1976 Copyright Act, and because the proposal is so drafted that it may subvert even its own intended individual author benefits, the Copyright Office probably would not support it at this time.

The Office is aware of, and concerned about, same reported abuses of the present law's for-hire provisions such as exacting for-hire agreements for commissioned works. However, on balance, we are unable to support GAG's proposal because we believe it would severely interfere with private employment contracts and would place publishers and other exploiters of copyrighted works under very severe, if not crippling, constraints in marketing their works. In addition, users who traditionally seek

reprint permission from publishers would be faced with the herculean burden of either tracking down individual authors for permission or risking copyright infringement. These drawbacks, it seems, outweigh the sympathies one feels for individual authors who lack the bargaining power to resist isolated unfair publisher practices.

On the other hand, some of the principles embodied in the proposal, especially that proposing to clarify the point in time when a work for hire must be signed, are useful and should be adopted. The Office believes the Judiciary Committee's hearings were useful in continuing to present authors' and publishers' concerns with respect to work for hire practices, and we would be pleased to continue to work with your staff in considering possible future efforts to modify these provisions of the Copyright Act.

Yours truly,

/s/ Dorothy Schrader
DOROTHY SCHRADER
Associate Register of Copyrights
for Legal Affairs

Supreme Court, U.S.
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No. 88-293 (12)

In The

Supreme Court of the United States

October Term, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, et al.,

Petitioners,

v.

JAMES EARL REID,

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Whether, under the "work made for hire" provision of the Copyright Act of 1976, 17 U.S.C. Sections 101 and 201(b), a commissioning party of a work can, through the exercise of supervision and direction of the work's creator, change the status of that creator from an independent contractor/artist to that of the party's "employee" without his knowledge and against his wishes, thereby taking from the creator all rights in the work.

LIST OF PARTIES

1. Petitioners are the Community for Creative Non-Violence, an unincorporated association of individuals, and Mitch Snyder.

2. Respondent is James Earl Reid.

3. Ronald Purtee was named a defendant in the District Court; however, he did not appear before the District Court or the Court of Appeals.

4. The Copyright Justice Coalition, an ad hoc group of some fifty organizations, filed an *amicus curiae* brief in the Court of Appeals in support of Respondent.

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STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. Commissioning Of The Sculpture

In the latter part of October 1985, James Earl Reid, a Baltimore, Maryland sculptor, received two phone calls from Mitch Snyder of CCNV, in Washington, D.C. Over the course of their conversations, Reid and Snyder reached an agreement whereby CCNV commissioned Reid to create a "contemporary nativity scene" to be placed at the Pageant of Peace in Washington in December. Transcript of trial before the District Court, February 3, 1987, at pages 224-25, Reid testifying.[1] The statue was to depict a homeless black family huddled over a steam grate. *CCNV v. Reid*, 652 F.Supp. 1453, 1455 (D.D.C. 1987).

Reid decided to donate his services to this "worthy cause." 2/2/87 Tr. 146 (Reid). He estimated that the costs of production of the sculpture would be $12,000.00 to $15,000.00. 2/3/87 Tr. 155-56 (Reid). Snyder agreed to reimburse Reid's expenses. 2/2/87 Tr. 22 (Snyder). (CCNV ultimately paid Reid a total of $15,000.00). *CCNV*, 652 F. Supp. at 1455. Because of the time and money constraints facing CCNV, Reid decided to cast the sculpture in "Design Cast 62," rather than in the much more expensive and time-consuming bronze he normally uses. 2/3/87 Tr. 147 (Reid).

B. Creation Of The Sculpture

Reid immediately began work on the project. *CCNV*, 652 F. Supp. at 1455. (App. 31a). He hired a total of

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[1] Hereinafter, cited in abbreviated form, e.g., 2/3/87 Tr. 224-25 (Reid).

perhaps 12 workers to help him with the menial tasks and mechanical aspects of creating the sculpture. Reid planned their schedules, paid them, and supervised their work. 2/3/87 Tr. 189-90 (Reid).

Reid also began to develop the concept and mood for the sculpture. 2/3/87 Tr. 160 (Reid). He described the research phase to develop the artistic concept as a "search-and-discovery," as an evolving concept that takes on a life of its own. 2/3/87 Tr. 162 (Reid). He began by sketching models in various poses. *CCNV*, 652 F. Supp. at 1455 (App. 31a). At Snyder's request, Reid sent him one of the sketches to be used to help raise funds to pay for the statue.

At this time Reid visited Washington's homeless community; at Reid's request, Snyder arranged for him to meet a homeless black family that could serve as models for the nativity scene. After meeting the family, Reid rejected the parents as artistically unsuitable for the figures of Joseph and Mary, but approved of the couple's baby as the model for the Christ Child. Reid also observed homeless people on steam grates, including an elderly black woman sitting on a grate with a shopping cart, and in other "habitats." 2/3/87 Tr. 168-170, 211 (Reid).

In early November, Snyder and other CCNV members toured Reid's studio in Baltimore. 2/3/87 Tr. 172 (Reid). It was there that the title of the sculpture ("Third World America" with the legend, "and still there is no room at the inn") and the idea of the steam grate as a pedestal were discussed. 2/3/87 Tr. 174-5 (Reid).

It was decided that CCNV would use Reid's details and measurements to have the statue's base constructed by an outside firm at a cost of $7,000-$8,000. 2/3/87 Tr. 176, 177 (Reid); *CCNV*, 652 F. Supp. at 1455. Reid then provided a design showing the proportions of the grate and indicating where the sculpture would be attached to it. 2/3/87 Tr. 197 (Reid).

Reid continued to develop his concept for the sculpture, photographing the models he had selected in various poses. Throughout the seven-week period of creation, in fact, Reid "went through decisions as to what would be the final compositional state . . . for the effective completion of my composition and design." 2/3/87 Tr. 211 (Reid). Reid then completed the armature, or underwiring, for the sculpture, applied the first layer of clay, and began the first rendering, or specific shaping of the muscles of the figures.

In early December, Reid undertook the final rendering of his sculpture.[2] 2/3/87 Tr. 197 (Reid). The sculpture that evolved over the seven weeks is a complex piece of original art.

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[2] At this time Reid applied his copyright notice to the statue. All details that appear in the cast form of a statue have to be in the final clay rendering, from which the casting mold is made. 2/3/87 Tr. 201 (Reid). Reid's employee, artist Tom Lewis, who testified that he was in continual communication with CCNV "for the approval of the work," 2/2/87 Tr. 122 (Lewis), apparently did not relay word of the copyright notice to CCNV. *See*, 2/2/87 Tr. 125 (Lewis). Nonetheless, the District Court found that Reid claimed copyright ownership for the first time on December 24, 1985, the day the sculpture went on public display. *CCNV*, 652 F. Supp. at 1455 (App. 33a).

By December 12, 1985, all that remained to be done was the actual casting of the work. On that date, Reid received a phone call from Snyder, who demanded that the statue be delivered at once. Reid explained that the art work would be destroyed if the process were rushed at this stage. Snyder, a short time later, called Reid again and told him to take the necessary time to do a "first class work." *CCNV*, 652 F. Supp. at 1455 (App. 33a). This Reid did, and when he believed it was complete, delivered the sculpture, marked with a copyright notice in his name, to the Ellipse on December 24, 1985. *Id.*[3]

C. The Aftermath

Pageant officials rejected the sculpture because of its political message, so the work was placed on a nearby site, where it remained for a month. *CCNV*, 652 F. Supp. at 1455 n. 6, 1456 (App. 33a). It was then returned to Reid's studio so Reid could repair some damage it had sustained while being transported to Washington, D.C. *Id.* at 1456.

On February 13, 1986, CCNV members and Reid, accompanied by three other persons, met in Washington to discuss the future of the work. Snyder proposed a multi-city tour of the work to promote the cause of the homeless. Reid proposed that, given the evident fragility of the work, the statue be cast in bronze, or in the alternative, that a rubber master mold be made from which new castings could be made. 2/3/87 Tr. 217-18

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[3] Reid filed a copyright registration in his name with the Copyright Office of the Library of Congress on March 20, 1986.

(Reid). Snyder said CCNV would not spend any more money on the statue, but that Reid could do so if he wished. *CCNV*, 652 F. Supp. at 1456 (App. 33a).

Within the month, Snyder telephoned Reid to ask that the sculpture be given to CCNV right away. Reid refused to return the piece; he feared for its survival if it were sent on the tour suggested by Snyder. 2/3/87 Tr. 238 (Reid). As a result of this refusal, CCNV filed its Copyright Registration on May 21, 1986, and then sought, and received, a preliminary injunction placing the statue in its possession in July 1986. *Id.* at 1456.

II. PROCEEDINGS BELOW

A. The District Court

In June 1986, CCNV filed suit in U.S. District Court for the District of Columbia seeking the return of the sculpture from its creator, Reid, and a decision as to whether Reid or CCNV, the commissioner of the work, owned the copyright in the sculpture. On July 25, 1986, the District Court granted CCNV a preliminary injunction requiring Reid to return the statue to CCNV.

In a subsequent two-day bench trial the District Court was asked to determine copyright ownership based on the "work made for hire"[4] doctrine of the 1976 Copyright Act.[5] From the outset of the litigation Reid has maintained that he was never an employee of CCNV.

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[4] Hereinafter, "work for hire."

[5] Copyright Act of 1976, 17 U.S.C. Section 101 *et seq.* (1982 & 1986 Supp. IV).

CCNV v. Reid, 846 F.2d 1485, 1492 n.10 (D.C. Cir. 1988) (App. 14a). However, the District Court, in a decision dated February 9, 1987, adopted the "direction and supervision" test used by the Second Circuit (*Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984)) to find that Reid was an employee of CCNV, on the grounds that CCNV conceived the idea of the statue in specific detail, that CCNV had hired Reid for his representational skills rather than his artistic ability, and that CCNV made the last payment for the production costs of the statue only when they found the statue conveyed the message they wished. *CCNV*, 652 F. Supp. 1453, 1456-57 (1987) (App. 35a).

Thus, the District Court found, CCNV, as the "employer" of Reid, owned the copyright in the statue. *CCNV*, 652 F. Supp. at 1457 (App. 36a). Reid filed a timely notice of appeal on March 11, 1987.

B. The Court of Appeals

The United States Court of Appeals for the District of Columbia Circuit reversed the District Court and remanded the case for further proceedings on matters not at issue here. *CCNV*, 846 F.2d 1485. The court adopted the Fifth Circuit's agency law test to determine employment status as set forth in *Easter Seal Society for Crippled Children and Adults of Louisiana v. Playboy Enterprises*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1280, 99 L.Ed. 2d 491 (1988). The court agreed with the Fifth Circuit's view that the distinction Congress made between "employment" in Section 101(1) and "commissioned" work in Section 101(2) meant that the work of an

independent contractor can be a work for hire only if it is among the enumerated categories in Section 101(2) and only then if the parties agree in writing. *CCNV*, 846 F.2d at 1489. (App. 7a). The Fifth Circuit, in what it called the "literal interpretation" emphasized the "dichotomy in fact between employees and independent contractors." *CCNV*, 846 F.2d at 1492 (App.13a), quoting *Easter Seal*, 815 F.2d at 329. Under the Fifth Circuit's scenario, the employment status of a seller of a copyrightable work first would be determined by agency law, then Section 101 would be applied. *Id.*

Although the Fifth Circuit opinion had not yet issued at the time of the District Court's decision, the Court of Appeals noted that "Reid had in fact tendered to the district court an alternate position on all fours with the one thereafter enunciated" in *Easter Seal*, 846 F. 2d at 1498 n. 10. From the beginning of the litigation, Reid had maintained that he was never an employee of CCNV and that his sculpture was not within the nine categories of Section 101(2). *Id.*

The Court of Appeals below also noted with approval the scholarly commentary on the legislative history and its "almost unanimous support" for the view that the two sections of the work for hire definition are separate and distinct. *CCNV*, 846 F.2d at 1492. (App. 15a).

CCNV filed a petition for certiorari to this Court on August 17, 1988. It was granted on November 7, 1988.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals below correctly held that the copyrightable work of an independent contractor cannot be a work for hire under Section 201(b) of the 1976 Act unless that work falls within one of the specific categories enumerated in Section 101(2) and the parties expressly agree in a written instrument signed by them that the work shall be considered a work for hire. 17 U.S.C. Section 101(2). The Court also properly concluded that the subject, "Third World America" does not qualify as a work for hire because Reid was an independent contractor/artist and not a CCNV employee under Section 101(1), the sculpture is not among the nine categories enumerated in Section 101(2), and, finally, there was no written agreement between CCNV and Reid.

CCNV concedes that it has no access to the copyright of the sculpture under the "specially ordered or commissioned" work provisions of subdivision (2) of Section 101. Therefore, it must argue, as it does, that Reid was an actual employee of CCNV and created the sculpture in "the course of his employment".

Clearly when CCNV's Snyder and Reid met for the first time by telephone in late October 1985, Reid was not CCNV's employee under any standard. Reid was an independent artist and CCNV commissioned him to create a sculpture for the Pageant of Peace on the Ellipse in December. CCNV claims, as it must in order to prevail, that action taken by it somewhere along the line transformed Reid from an independent contractor into a CCNV employee and his work into a work for hire. CCNV claims that without Reid's knowledge and against

his wishes, he became a CCNV employee. Reid claims he continued in his independent contractor role and never became such an employee.

CCNV urges this Court to reverse the Court of Appeals and accept a "test" specifically rejected by the Fifth, Ninth, and District of Columbia Federal Circuits. Under CCNV's test the commissioning party can claim, as it did here, for the first time after the artist finishes his work, that some degree of supervision and direction by that commissioning party makes the work one "for hire" under the Act. Reid respectfully suggests that CCNV's test should be rejected by this Court for the same reason that it has been rejected by three Federal Circuit Courts: it is virtually impossible for the parties to a commissioned work to accurately predict what their relationship to one another will be and how it will change between the time the creative process begins and the time it ends. Not only does CCNV's so-called "supervision and direction" test rob from the negotiations all sense of predictability and place the power to change the relationship solely in the commissioning party's hands, it also violates accepted rules of statutory construction and contravenes the letter and spirit of twenty years of legislative history while gathering almost no support among scholars.

The Court of Appeals relied upon the doctrine of the law of agency, as did the Fifth Circuit, to find first that Reid was not an agency law employee and the work, accordingly, was not a work for hire. The Circuit Court had a fully-developed, uncontested factual record before it in ruling that under the agency law test it had found to be appropriate, Reid was not CCNV's employee. This is the only result which can be supported by this record.

Accordingly, should this Court find that the Fifth Circuit's agency law approach is appropriate, CCNV's request for a remand must be denied.

Reid suggests that the approach taken recently in the Ninth Circuit, an approach urged upon this Court by the United States Copyright Office, as amicus, most properly addresses the Copyright Act's work for hire provisions. Under the Ninth Circuit approach, which enjoys the support of most scholarly reviews, as well as comporting with the Act's legislative history, an individual is an "employee" for the purposes of Section 101(1) if he or she works for the commissioning party as a regular salaried employee. Under this straightforward approach, parties on both sides of commissioned or contracted-for work know with solid predictability what their relationship is and will be: if the individual is a formal, salaried employee his or her work will be a work for hire and the employer will be deemed the "author" of the work and the owner of its copyright. If a formal, salaried employment relationship is not present and the work is not governed by subdivision (2) with a signed agreement, then the work is simply not a work for hire. Certainly, should the Court find that the Ninth Circuit approach is appropriate then remand to the District Court would be inappropriate because neither party claims that Reid was ever in such a relationship with CCNV.

CCNV argues that the Court of Appeals' opinion produces negative fallout in the form of "fractionalization" of the copyright where more than one party potentially holds a valid claim to a copyright. As CCNV points out, they will pursue that issue on remand and it is not before this Court.

However, Reid must point out the hypocritical nature of CCNV's argument, which is that only commissioning parties can question the parties' relationship once the creative process is underway. CCNV urges a completely after-the-fact review that would strip Reid of all copyright ownership, on the one hand, and decrys as too disruptive a system where joint authors can be found to exist. As with the remainder of their argument, this argument must be rejected.

ARGUMENT

I. THE *ALDON* "SUPERVISION AND DIRECTION" TEST LACKS PREDICTABILITY, VIOLATES THE RULES OF STATUTORY CONSTRUCTION, HAS BEEN REJECTED BY LEGAL SCHOLARS, AND IS NOT SUPPORTED BY LEGISLATIVE HISTORY

A. Utilization Of The After-The-Fact *Aldon Accessories* Test Forces The Parties To Negotiate A Contract Without Being Able To Predict Accurately What Their Relationship To One Another Ultimately Will Be

The Second Circuit in *Aldon Accessories Ltd. v. Speigel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984), ruled in a contested copyright case that where the commissioning party to a work exercises enough direction and supervision over an artist during the creation of a work, that artist becomes an employee of the commissioning party, and the work a "work for hire" with the copyright belonging to the "employer" for purposes of Section 201 of the Copyright Act of 1976. The approach utilized in *Aldon Accessories*, which is urged upon this Court by CCNV as the *Aldon* test, has been rejected

emphatically by the Fifth Circuit in *Easter Seal Society for Crippled Children and Adults of Louisiana v. Playboy Enterprises*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 469 U.S. 982 (1984), by the District of Columbia Circuit Court in *CCNV v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988), and most recently by the Ninth Circuit in *Dumas v. Gommerman*, 89 Daily Journal D.A.R. 501 (9th Cir. 1989). Reid suggests that the *Aldon* test, which thwarts the ability of parties to negotiate contracts with the firm knowledge of what their relationship will be at the end of the creation period, improperly permits the commissioning party unilaterally to change the artist's status from independent artist/ contractor to employee.

In rejecting the *Aldon* direction and supervision approach the court below and the Fifth Circuit in *Easter Seal* each noted that the *Aldon* opinion was based upon an extreme set of facts.[6]

Reid respectfully argues that the court below correctly rejected the *Aldon* test in ruling that the "Third World America" statue does not qualify as a work for hire

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[6] The Court below viewed the *Aldon* facts as follows: "We pause here to observe that unlike the instant case, in which artists and commissioning parties vie for ownership of a copyright, *Aldon Accessories* pitted the commissioning party (to boot, a genuinely creative participant) against a third-party infringer (and a blatant one at that)." *CCNV*, 846 F.2d at 1490. (App. 10a).

. . . [T]he *Aldon Accessories* court may have been driven to create the narrow 'actual control' exception to the general rule that independent contractors hold the copyright under the 1976 Act by the fact that on appeal the defendant more or less conceded infringement but tried to escape liability on 'work for hire' grounds. *Easter Seal*, 815 F.2d at 333.

because Reid was an independent contractor and not CCNV's employee and the "sculpture surely is not a category of commissioned work enumerated in Section 101(2)," and, finally, "no written agreement existed between CCNV and Reid." *CCNV*, 846 F.2d at 1494. (App. 19a).

Under the *Aldon* test there is a complete lack of predictability when determining ownership of copyright in a commissioned work. Under its application it cannot be known who owns the copyright in a commissioned work, whether it is a work for hire or not, until after the work is completed and a copyright challenge is made. It is only upon completion of the work that the parties will be in a position to ascertain whether enough "direction and supervision" has been exercised to change the creator's status from independent contractor to employee and the work into a work for hire. As CCNV acknowledges, the *Aldon* test requires the actual exercise of the right of direction and supervision. CCNV's brief at 33. Every determination of copyright ownership will therefore be based on a post-completion analysis of the hiring party's contribution. After-the-fact renegotiations of the terms and conditions of the initial agreement between the parties is a likely but unpalatable result.

The practical effects of this test are to undermine contractual agreements and disrupt normal business practices. The case before the Court is a vivid example of the failure and undesirable effects of the *Aldon* test. Respondent James Earl Reid was hired as an independent contractor to create a specially-commissioned work. At the time the parties came to an initial understanding of the terms of their agreement, there was no discussion of

work for hire or of an assignment of copyright. Mr. Reid created the sculpture as promised, believing during the entire process that he owned the copyright. Prior to casting he placed his copyright notice on the piece of art and later registered the copyright solely in his name. 2/3/87 Tr. 201 (Reid), *CCNV*, F. Supp. at 1456 (App. 33A). It was only after completion of the work that CCNV asserted copyright ownership as a result of its alleged direction and supervision, which it claimed evolved during the post-negotiation, creation period. The District Court's ruling allows Reid's independent status as well as his copyright in the sculpture to be stripped from him, without his knowledge and against his wishes.

As the Fifth Circuit stated, the rule of *Aldon Accessories* makes business arrangements exceedingly difficult. "Rather than making a relatively simple business judgment about whether the seller is an employee or independent contractor, and relying on 'work for hire' rules or arrangements for copyright assignments accordingly, buyers and sellers will have to predict in advance whether a buyer's 'actual control' over a given work will make it the 'author.' If they guess incorrectly, their reliance on 'work for hire' or an assignment may give them a copyright interest they did not bargain for." *Easter Seal*, 815 F.2d at 333. "Because the 'work for hire' status turns on the actual control by the buyer with respect *to each work* (as the *Aldon Accessories* court makes clear), the outcome can vary even between the same buyer and same seller in a series of works produced together." *Id.*

B. The *Aldon* Test Violates The Rules Of Statutory Construction

1. One Should Interpret A Statute According To Its Ordinary Meaning

When interpreting the meaning of a statute one looks to the ordinary meaning of the words used. *See*, 4 Sutherland Stat. Const. Sec. 46.01 ("[t]he meaning of the statute must, in the first instance, be sought in the language in which the act is framed,") and also, *Caminetti v. U.S.*, 242 US 470 (1961); *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977); *U.S. v. Pennsylvania Environmental Hearing Board*, 584 F.2d 1273 (3d Cir. 1978); *Brastex Corp. v. Allen International, Inc.*, 702 F.2d 326 (2d Cir. 1983); *Teel v. American Steel Foundries*, 529 F. Supp. 337 (E.D. Mo. 1981). Nothing in the ordinary or common use of the term "employee" suggests the *Aldon* test's definition. The *Aldon* definition is a special definition unique to one subsection of the copyright law. No statutory basis to use its non-traditional definition is put forth by CCNV. It has no other application and no place in common usage.[7]

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[7] "One who questions the application of the plain meaning rule to a provision of an act must show either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act considered in pari materia with other acts, or with the legislative history of the subject matter, imports a different meaning." Sutherland Sec. 46.01. *See, Great Lakes Properties, Inc. v. City of El Segundo*, 561 P.2d 244 (Cal. 1977); *Tiernan v. Trustees of California State University and Colleges*, 655 P.2d 317 (Cal. 1983); *Anderson v. Black & Decker (U.S.), Inc.*, 597 F. Supp. 1298 (ED Ky 1984).

2. Every Word In The Statute Should Be Given Effect

Under the tenets of statutory construction, effect must be given, if possible, to every word, clause and sentence of a statute. *See, U.S. v. Menasche,* 348 U.S. 528 (1955), cited in Sutherland sec. 46.06. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, *King v. Alaska State Housing Authority,* 633 P. 2d 256 (Alaska 1981); *Office of Consumers Counsel, State of Ohio v. Federal Energy Regulatory Commission,* 783 F.2d 206 (D.C. Cir. 1986), void or insignificant, and so that one section will not destroy another . . . ". *See,* Sutherland sec. 46.06.

Aldon violates the above doctrine by disregarding the entire second portion of section 101(1). To find a work for hire by an employee, the statute also requires that the work created be created "within the scope" of an employee's employment.[8] The *Aldon* test apparently permits the scope of employment to be ignored. Under that test, if there is sufficient supervision and direction of the creator by the hiring party there is no requirement or provision to determine whether the process was within the scope of employment. There, a supervised and directed creator is presumed, without an actual showing, to be acting within the scope of his or her employment. Accordingly, where all creations resulting from supervised and directed creators are automatically works for

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[8] 17 U.S.C. section 101. "A work made for hire is: (1) a work prepared by an employee within the scope of his or her employment. . . ."

hire, the second prong of section (1) is rendered superfluous. Such an approach contravenes Congress' attempt to accomplish through the inclusion of a scope of employment requirement, a clearer, more predictable doctrine.

C. The Aldon Test Has Been Overwhelmingly Rejected By The Vast Majority Of Scholars

The work for hire definition problem before the Court has attracted substantial scholarly attention. The approaches and conclusions advanced in the articles and comments vary, but nearly all of them support the proposition that the *Aldon* test is not a suitable vehicle for resolving the work for hire dilemma. The scholars have found *Aldon* to be unpredictable, unworkable, unsuitable, incorrect, and in violation of the legislative history and statutory construction.

See, for example, Fidlow, *The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification,* 10 Hastings Comm/Ent L.J. 591 (1988) (the lack of a sound judicial interpretation of the "work for hire" doctrine, as evidenced by *Aldon* and its progeny, compels legislative reexamination of the statute); Fitzgibbon & Kendall, *The Unicorn in the Courtroom: The Concept of "Supervising and Directing" an Artistic Creation is a Mythical Beast in the Copyright Law,* J. Arts Mgmt. & L., Fall 1985 at 25 ("[u]nder *Aldon,* . . . the language of the new Copyright Act and the logic behind its restricted work for hire provision became casualties of judicial misunderstanding . . . "); Goldberg, *Works Made for Hire – A Copyright Quagmire,* N.Y.L.J., March 20, 1987, ("[i]t is difficult to

justify the application of 1909 reasoning in *Aldon* as anything but result-oriented"); Hamilton, *Commissioned Works as Works made For Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. Pa L. Rev. 1281 (1987)("[b]eginning with the 1984 decision in *Aldon*, the Second and Seventh [*Evans Newton*] Circuits have embarked on a line of reasoning that threatens to undermine the legislative compromise represented by the 1976 Act's work-made-for-hire provisions") at 1295, (had the decision in *Aldon* not been followed by *Evans*, it "could be dismissed as an example of an appellate court reaching an equitable result by the easiest available reasoning, and its potential to upset the legislative compromise concerning commissioned works could be ignored") at 1303; Hardy, *Copyright Law's Concept of Employment – What Congress Really Intended*, 35 J. Copr. Soc. U.S.A. 210, 217 (April 1988) (examination of legislative history and conflicting case law reveals that *Aldon*'s interpretation of the work for hire doctrine is incorrect); Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857 (1987) ("[the *Aldon* court] "resolved the conflict [between the language of the 1976 Act and the Second Circuit's previously created definition] by cleaving to earlier doctrine and mangling the statutory language to fit") at 900, ("*Aldon* undermines the statutory effort to make copyright ownership more certain") at 901; Ossola, *Work for Hire: A Judicial Quagmire and a Legislative Solution*, 17 Arts Mgmt & Law 23, 37 (Fall 1987) ("[r]egardless of the *Aldon* court's motivation, its analysis of the work for hire question utterly disregarded the legislative history . . . "); 6 Patry, *Latman's The Copyright Law*, 123-24 (1986) ([*Aldon* has] "incorrectly viewed the provision of the first subdivision of the definition of work made for hire . . . as

continuing the common law presumptions developed under the 1909 Act and has thereby seriously upset the carefully crafted compromises enacted by Congress in the 1976 revision legislation"); Note, *The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976*, 62 N.Y.U.L. Rev. 373, 389 (1987) ([t]he *Aldon* court misapplied the literal terms of the 1976 Act"); Note, *The Works Made for Hire Doctrine of the 1976 Copyright Act After Aldon Accessories Ltd. v. Spiegel, Inc.*, 5 Cardozo Art & Ent. J. 265, 283 (1986) ("[o]ne of the major problems with the *Aldon* decision is the court's seeming disregard for the statutory language of Section 101 of the 1976 Act") at 283, ("[t]he court's holding . . . obliterates any distinction between employees and independent contractors, a distinction which is crucial to the works made for hire provision of the 1976 Act") at 280; Note, *The Works Made for Hire Doctrine Under the Copyright Act of 1976 – A Misinterpretation: Aldon Accessories Ltd. v. Spiegel, Inc.*, 20 U.S.F.L. Rev. 649 (1986) ("[t]he court [in *Aldon*] appears to have improperly interpreted the [1909] Act case law and the [1976] Act legislative history") at 661, (" . . . *Aldon* has apparently broken down the [1976] Act's works made for hire dichotomy between employees and independent contractors") at 669.

D. The *Aldon* Test Permits Several Outcomes Which Are Antithetical To The Intentions Of The Statute's Framers And Would-Be Contracting Parties

1. The *Aldon* Test Violates the Idea/Expression Dichotomy of the Copyright Law

A generally recognized and uniformly accepted concept in the copyright law is the dichotomy between an

idea and its expression. *See, e.g., Baker v. Selden*, 101 U.S. 99 (1879). Ideas are not protected by copyright. 17 U.S.C. Sec. 102 (b). See, *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Hoehling v. Universal Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); 1 Nimmer, *Nimmer on Copyright* sec. 2.03(D) (1987). Only when an idea is expressed and fixed in a tangible form does it acquire protection under the copyright law. 17 U.S.C. Section 102(a). *Aldon* allows a copyright to vest in a hiring party who does no more than contribute ideas, disregarding the efforts and interest of the one who fixed the ideas into a tangible form.[9] A number of courts have avoided this pitfall and recognized that there must be more than the contribution of ideas in order to create a work for hire.[10] Unfortunately, however, some courts have fallen prey to

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[9] "Snyder and his colleagues not only conceived the idea of a contemporary Nativity scene to contrast with the national celebration of the season, they did so in starkly specific detail. They then engaged Reid to use his representational skills, rather than his original artistic vision, to execute it." *CCNV v. Reid*, 652 F. Supp. 1456 (1987). (App. 35a).

[10] *Kenbrooke Fabrics, Inc. v. Material Things*, 223 U.S.P.Q. 1039, 1045 (S.D.N.Y. 1984) (detailed ideas conveyed by the commissioning party to the independent contractor are not copyrightable and do not establish copyright ownership in the commissioning party); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Co.*, 542 F. Supp. 252, 259 (D. Neb. 1982) (contributing ideas, directing changes and exercising approval power at each stage of the development of a work is normally expected of a commissioning party and does not render that party the statutory "author"). *Meltzer v. Zoller*, 520 F. Supp. 847, 857 (D.N.J. 1981) (the architectural firm who had fixed "the ideas for the . . . home in a tangible medium, created those plans . . . ").

Aldon's simplistic yet faulty reasoning. These courts, such as the District Court below, have rendered decisions which contravene this fundamental copyright principle.

2. Works Created By Traditional Salaried Employees Could Be Deemed Not Works For Hire

CCNV specifically denies that the statute's use of the word "employee" means only "formal salaried employee".[11] Under the *Aldon* test a perverse result would be reached in the common situation in which a traditional, salaried employee works on a copyrightable project without any specific direction and supervision by his or her employer. Using the *Aldon* test, such a work created without the employer's direction and supervision, even if created within the scope of employment, would not be deemed a work for hire in the absence of actual direction and supervision. Works thus created would not be owned by the employer but by the employee. This outcome is at odds with the language, intent, and legislative history of the statute but is an inevitable result of the *Aldon* test.[12] Only by interpreting the term "employee" as used in Section 101(1) with two

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[11] Petitioner's brief at 40-43.

[12] While the *Aldon* test might deprive an employer of its rights under the work-for-hire doctrine, it can have the opposite and equally troubling effect of giving a non-employer commissioning party the benefits associated with employers, (i.e., ownership of a copyright as a work for hire), without any of the corresponding employer obligations and responsibilities.

meanings, one very expansive and one far more limited, can the above anomaly be avoided. No such dual approach to a single word is supported anywhere in the legislative history.[13] Indeed, the notion flies in the face of the accepted presumption that when a word is used in a statute, it has one meaning for all uses. *See, ICC Industries, Inc. v. U.S.*, 812 F.2d 694 (C.A. Fed. 1987). *See also,* Sutherland Sec. 46.06 ("[t]here is a presumption that the same [word] used twice in the same act has the same meaning"). While *Easter Seal* and the District Court below identified this problem,[14] neither Petitioners nor the *Aldon* court provides a solution or a basis for using differing definitions of the terms.

E. Summary

The *Aldon* court, faced with a difficult case, endeavored to achieve an equitable result. In the process, however, it misapplied the statute and developed a test which

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[13] House Committee on the Judiciary, Copyright Law Revision, H.R. Rep. No. 2237, 89th Cong., 2d Sess. 3, reprinted in Grossman, *Omnibus Copyright Revision Legislative History* (1976).

[14] "We think it safe to assume – because the contrary result would be almost unimaginable – that the Second Circuit would not apply the 'actual control' test to determine if an employer was the 'author' of works produced by actual employees within the scope of their employment." *Easter Seal*, 815 F. 2d at 334. "Doubtless, the *Aldon Accessories* court intended to apply the "actually sufficiently supervised and directed test only to determine whether independent contractors are employees. The copyrightable work of regular or formal employees is work made for hire without regard to the employer's exercise of control." *CCNV*, 846 F.2d at 1490 n.6. (App. 9a).

produces unworkable results, creates an environment of uncertainty and violates the tenets of statutory construction. The *Aldon* test should be rejected in favor of a test that provides predictability, abides by the rules of statutory construction and carries out the intent of Congress as shown through the legislative history of the Act.

II. TREATMENT OF THE TERM, "EMPLOYEE WITHIN THE SCOPE OF HIS OR HER EMPLOYMENT," AS MEANING A REGULAR SALARIED EMPLOYEE IS SUPPORTED BY THE NINTH CIRCUIT, THE U.S. COPYRIGHT OFFICE, AND MOST SCHOLARLY COMMENTARY, AND COMPORTS WITH RULES OF STATUTORY CONSTRUCTION AND WITH THE LEGISLATIVE HISTORY OF THE 1976 COPYRIGHT ACT

A. The Court of Appeals for the Ninth Circuit, Which Provides the Most Recent Opinion On The Work for Hire Issue, Joins the Federal Government and Voluminous Scholarly Commentary In Finding Section 101(1) Refers Only to Formal, Salaried Employees

The Ninth Circuit in *Dumas v. Gommerman*, 89 Daily Journal D.A.R. 501 (9th Cir. 1989) ("*Dumas*"), the U.S. Copyright Office[15] and numerous commentators[16] on the 1976 Copyright Act, 17 U.S.C. Section 101 *et seq.*, all support an interpretation of the term, "employee within the scope of his or her employment," as contained in the work for hire definition, that is strikingly different from

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[15] *See amicus* brief of the U.S. Copyright Office; *see also amicus* brief of The Copyright Justice Coalition.

[16] See discussion of selected articles, *infra*.

that found by the *Aldon* court. Under this interpretation, an "employee" is an individual hired by another at a regularly paid salary to work over a long, indefinite time period and often entitled to employee benefits such as health insurance, paid vacation, sick leave, and retirement. In short, this definition is what most people understand "employee" to mean.

The advantages of such a definition are compelling; it is understood by virtually everyone, without resort to legal terminology. It provides predictability and certainty as to copyright ownership from the beginning of a work for hire relationship. It is applicable to the vast majority of work for hire situations; "where the artist holds himself . . . out as a freelancer, the employer should anticipate that the commissioned work will not be a work for hire under Section 101(1)."[17] Moreover, the *Dumas* interpretation gives to the first part of the "work-for-hire" definition the same treatment accorded part (2), "a work specially ordered or commissioned". The ordinary meaning routinely given a "commissioned work", a work prepared by an independent contractor for another party pursuant to a contract, has engendered little controversy or litigation, because that meaning is clear and widely understood and accepted.

The *Dumas* opinion, filed January 13, 1989, is the latest circuit court view of the work for hire issue. The

[17] For those very limited situations where this definition does not resolve all questions, an agency-type analysis would still be available to the courts. *See, e.g., Dumas*, 89 Daily Journal D.A.R. at 506.

court found that the first part of the work for hire definition, Section 101(1), refers only to formal, salaried employees, and Section 101(2) applies only to the nine types of enumerated commissioned works where there is also a written agreement that the work in question is to be a work for hire. This case involved a dispute over the ownership of copyrights in four original paintings created by Patrick Nagel, the late husband of Jennifer Dumas, the plaintiff-appellee. The defendants, an art gallery and its owner, Gommerman, appealed from a grant of a preliminary injunction restraining them from reproducing and marketing the art work in which both parties claimed copyright. The art work had been produced under contract with an advertising agency for its client, ITT Canon, to give away as sets of lithographs in what turned out to be an unsuccessful promotional campaign. The contract did not mention work for hire or copyright. ITT Canon threw away the original art and later sold the leftover lithograph sets and any copyrights in the works it might hold to Gommerman, who registered the works in his name. Dumas also claimed copyright and sought and received the preliminary injunction preventing Gommerman from exploiting any rights in the works.

The Ninth Circuit reasoned that the structure of the two-part work for hire definition in 17 U.S.C. Section 101 was maintained by Congress in passing the 1976 Act because it did not want to disturb the compromise agreed to in 1965 by the creators and marketers of copyrightable works. Under that compromise, works made for hire would not be subject to the artist's right to terminate a transfer of copyright after 35 years. "In exchange, the old tests under the 1909 Act, which favored employers,

would be replaced by a new definition distinguishing works prepared by employees within the scope of their employment from works prepared on commission." 89 Daily Journal D.A.R. at 504.

Commentary on the 1976 Act also supports the notion of "salaried employees." *See, e.g.*, Fidlow, *The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification*, 10 Hastings Comm/Ent L.J. 591, 619 (1988) (Senator Cochran's recent proposal to qualify "the definition of 'work prepared by an employee within the scope of his or her employment' by adding a phrase allowing the category to apply only where the 'employee' is provided with full benefits and incidents of employment according to applicable state and federal law, including withholding taxes" . . . "represented a better-focused attempt to resolve the uncertainties left after the *Aldon* decision"); Galley, *Authorship and Copyright of "Works Made for Hire": Bugs in the Statutory System*, 8 Art & Law 573, 581 (1984) (the term "employee" under both the 1909 and the 1976 Acts refers to salaried employees); Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. Pa L. Rev. 1281, 1313 (1987) (defining "employee" as "one who receives employment benefits required by law and one whose employer withholds taxes from salary" would prevent results similar to the *Aldon* court's "transformation of works by types of independent contractors not listed in subdivision (2) into subdivision (1) employee works . . . "); Hardy, *Copyright Law's Concept of Employment – What Congress Really Intended*, 35 J. Copr. Soc. 210 (April 1988) ("[t]hroughout the studies, the reports, the

discussions, and the hearings, the comments of nearly every participant showed an understanding that 'employment' meant formal, salaried employment; nothing from Congress either in the language of the Act or in the committee reports has ever suggested otherwise") at 222-23, (the most "satisfactory test of employment is that of regular, formal employment – exactly what lay persons would think 'employment' means, and exactly what every major participant in the discussions of copyright revision meant when using the term") at 258; Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857, 890 (1987) (" . . . the content of the pre-legislative dialogue and the context in which it occurred indicate that by using the term 'employee' the parties meant to limit works made for hire under this branch of the definition to works created by a salaried worker in a long-term position"); Ossola, *Work for Hire: A Judicial Quagmire and a Legislative Solution*, 17 Journal of Arts Mgmt & Law 23, 26 (Fall 1987) ("Clause [1] of [the definition of work-for-hire] adhered to the well-established principle that works created in the course of a salaried employee's employment should be treated as works for hire under federal copyright law"); 6 Patry, *Latman's The Copyright Law*, 118-25 (1986) (the phrase "within the scope of employment" contemplates only formal, salaried employees); Comment, *Free Lance Artists, Works for Hire, and the Copyright Act of 1976*, 15 U.C. Davis L. Rev. 703, 708 (1982) ("[t]he New [1976] Act codifies prior law by providing that a work prepared by a salaried employee within the scope of her employment is a work made for hire"); Note, *The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976*, 62 N.Y.U.L. Rev.

373, 378 (1987) ("[e]ven before the passage of the 1909 Act, the Supreme Court recognized that an employer is entitled to own the work of his salaried employees"); Note, *The Works Made for Hire Doctrine Under the Copyright Act of 1976 – A Misinterpretation: Aldon Accessories Ltd. v. Spiegel, Inc.*, 20 U.S.F.L. Rev. 649, 666 (1986) (" . . . there are indications in the legislative history that subdivision (1) of the works made for hire definition should include only salaried employees").

B. Under The Rules of Statutory Construction, Ordinary Words In A Statute Are Given Their Ordinary Meaning; Therefore, The Word, "Employee," Which Appears In Section 101(1) of the 1976 Copyright Act, Means A Salaried Employee

In the absence of a statutory definition, "the general rule is that popular . . . import of words furnishes the general rule for the interpretation of public laws." *Deputy v. duPont*, 308 U.S. 488, 493 (1940). Words of statutes should be interpreted where possible in their ordinary, everyday senses. *Malat v. Riddell*, 383 U.S. 569, 571 (1966).

Thus, the word "employee," which is not defined in the 1976 Copyright Act, should be given its plain, everyday meaning. One dictionary in 1972 defined "employee" as "[a] person hired by another, or by a business firm, etc., to work for wages or salary." Webster's New World Dictionary, Second College Edition, 1972, at 459.

There is authority to the effect that where a term has a settled legal meaning, the courts may infer that that is the meaning the legislature intended. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981), *reh'g denied*, 453 U.S. 950. At

least arguably, therefore, the agency definition of "employee"[18] could be incorporated into the 1976 Copyright Act. However, a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). Certainly, the *Aldon* "supervision and direction" test to determine employment status has no settled legal meaning.

Moreover, where one of several possible interpretations of a statute produces an unreasonable result, that interpretation should be rejected in favor of one that would produce a reasonable result. *United States v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985), quoting Sutherland Section 45.12. As set out earlier in this brief,[19] the *Aldon* "supervision and direction" test to determine employment status enables a commissioner of a work not mentioned in Section 101(2) to gain ownership of the copyright in the work merely by exercising supervision and control at some stage of the project. In contrast, the "salaried worker" definition of "employee" is clear, simple to apply, and conclusive at the outset.

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[18] Section 220, Restatement of Agency. *But see NLRB v. Hearst Publications*, 322 U.S. 111, 120 (1944), suggesting there is no "simple, uniform and easily applicable" common law test to distinguish between employees and independent contractors.

[19] *See supra*, Part I of Argument.

C. The Legislative History of the 1976 Copyright Act Makes It Clear that Participants In The 20-Year Revision Process Assumed The Term, "Employee," Meant A Regular, Salaried Employee

Courts may consider extrinsic aids to interpret statutory language even when the language is plain. *Foulkes v. Commissioner of Internal Revenue*, 638 F.2d 1105 (7th Cir. 1981). Extrinsic aids consist of certain background information that comprises the history of a statute. *Sutherland Section 48.01*. It would take a very clear expression in the legislative history of congressional intent to the contrary to justify the conclusion that the statute does not mean what it so plainly seems to say. *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 697 (1980), in *dicta*.

In this case, however, the legislative history fully supports the view that the ordinary and commonly accepted meaning of "employee" is a regular salaried worker. As there is no bar to examination of legislative history when the meaning of a term is clear, a brief review of the relevant legislative history follows.

The revision process that culminated in the 1976 Copyright Act, which replaced the Copyright Act of 1909, 17 U.S.C. Section *et seq*. (1970), began in 1955. In that year and for the next three years, Congress provided funds for a comprehensive program of research and studies by the Copyright Office. One of the studies that came out of this effort reviewed works made for hire and on commission. Study No. 13, *Works Made For Hire and On Commission*, by Borge Varmer, 1958, ("Varmer"). Borge Varmer concluded from a review of case law that the 1909 Act, which did not address commissioned works at all, referred only to

salaried employees producing works for hire. Varmer at 130. It was Varmer who proposed the definition of "works made for hire" ("works created by an employee within the scope of his employment") that remained virtually unchanged throughout the revision process. Varmer at 141.

Although Varmer suggested that if the employment-for-hire rule was not to include commissioned works, the definition might further specify "employment on a salary basis," *id*., Congress chose a different approach. In various draft bills introduced over the course of the 20-year revision process several interpretations were proposed. Congress initially specifically excluded commissioned works from the works-made-for-hire definition. Later commissioned works were included where the parties so agreed in writing. And in 1965 Congress divided the definition into two sections, the first dealing with employees and the second, with specified commissioned works, the number of categories of which changed in different proposals.[20] (The 1976 Act contains nine such categories. 17 U.S.C. Section 101(2).)

In 1961, the Copyright Office issued its first report containing tentative recommendations to revise the 1909 Act. *Report of the Register of Copyrights on the General*

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[20] *See Copyright Law Revision, Part I, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 1961; *Copyright Law Revision, Part 5, 1964 Revision Bill with Discussion and Comments*, 89th Congress, 1st Session, September 2, 1965; *Hearings on H.R. 4347, H.R. 5680, H.R. 6831 Before Subcommittee No. 3 of the Committee of the Judiciary, 89th Congress, 1st Session, Serial No. 8, 1965.*

Revision of the U.S. Copyright Law, 1961. The report suggested that works-made-for-hire should not include commissioned works because case law did not support such a view. It said that a work made for hire should be defined as a work "created by an employee within the regular scope of his employment". *Id.*, at 86, 87. Barbara Ringer, then Assistant Register, stated that with respect to works-made-for-hire, the report would "leave the present law [the 1909 Act] undisturbed." *Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, February 1963, 88th Congress, 1st Session, at p. 144.

Between 1962 and 1965, the issue of work for hire was extensively debated before Congress.[21] The concern of the participants (representatives of motion pictures, music companies, publishers, artists, composers, and authors), however, centered on what types of works, if any, should be included under the "commissioned works" part of the definition. Intense emotions arose over the treatment of commissioned works, fueled by a proposed "reversion" clause (17 U.S.C. Section 204) under which transferred and licensed copyrights, but not those associated with works for hire, could revert to the original creator after a period of years. Motion picture producers, the music industry, and publishers of textbooks and reference works were concerned that if they were not

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[21] *See generally* G. S. Grossman, *Omnibus Copyright Revision Legislative History*, 1976, Vols. 1-17, (contains all the Congressional Committee prints of the revision process from the first Copyright Office studies funded initially in 1955 through H.R. Report No. 94-1476, which accompanied the 1976 Act).

designated the authors of works that required the contributions of a number of individuals, the legal complications would be immense and the copyright laws of other countries would undermine their ability to market their product. On the other hand, organizations representing individual writers and artists feared that these individuals could be forced to sign away their copyrights because of their inferior bargaining power. Screenwriters also urged adoption of a patent-law "shop rights" approach whereby employees retained all rights in their works except those that the employer required to conduct its business, a suggestion Congress did not adopt. *See* Hardy, *Copyright Law's Concept of Employment – What Congress Really Intended*, 35 J. Copr. Soc. U.S.A. 210, 236-40 (1988); *House Report 89-2237*, October 2, 1966, at 114-116.

Finally, in April 1965, the two sides agreed to a compromise: eight categories of commissioned works could be considered works for hire. That 1965 compromise agreement was enacted into the 1976 Act, with only one change – the category of "answer material for a test" was added to the list. *H.R. Rep. 89-2237* at 116.

Unlike the sometimes fiery debate over "commissioned works," virtually without exception participants in the revision process used the term "employee" to mean a regular, salaried employee.[22] No matter which side of

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[22] Only one participant suggested that the definition of "works made for hire" use the terms, "master" and "servant." The Register of Copyrights rejected those terms as "medieval." *Copyright Law Revision, Part 3, Preliminary Draft for Revised U.S. Copyright and Discussion and Comments on the Draft*, 1964, p. 273. Never in all the hearings, reports, studies is the definition set forth in *Aldon* proffered.

the work for hire issue the parties were on, their oral and written comments consistently showed that they distinguished between a regular, salaried employee and all other types of working relationships.

See, e.g., Copyright Law Revision, Part 2, Discussion and Comments on Report of The Register of Copyrights on the General Revision of the U.S. Copyright Law, February 1963, 88th Congress 1st Session: " . . . a man who comes in and works for you, is employed on a week-to-week basis . . . ". " . . . an employer who meets a weekly payroll . . . ". " . . . he can write on speculation, he can come in and give you his finished product, instead of sitting down week by week and drawing weekly compensation . . . " (pages 153-155). *Copyright Law Revision, Part 3, Preliminary Draft for Revised U.S. Copyright Law and Discussion and Comment on Draft, 1964*: " . . . the necessity of putting people on the payroll whom the employers would not want to put on the payroll, and where the employees would prefer to work as independent contractors" (page 258-259). " . . . the situation in which you have a man on a continuing basis of orders which justifies placing him on your payroll, and the situation in which you give him a particular order for a particular job" (page 260). " . . . their comptrollers and accountants start going into a real tailspin the minute they start seeing the word, "employee," because this means social security, withholdings, and all the other attendant mechanical housekeeping tasks" (page 267). "It might be helpful not to restrict a work made for hire to the technical employer-employee relationship" (page 321). Objecting to the exclusion of commissioned works from the definition: "It is neither practical or possible to hire these specialists as

employees on a full-time basis" (page 340). *Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcommittee No. 3 of the Committee of the Judiciary, 89th Congress, 1st Session, Serial No. 8, 1965*: " . . . employee for hire, as well as a party who specifically orders or commissions a work . . . as if it were an ordinary employment for hire relationship" (page 264). "If authors increasingly turn toward employment, it will ordinarily be a matter of necessity rather than preference. The employer, who will commonly pay far more for a restricted right to use a work when acquired from an independent author, should not be permitted to swallow up the authorship status when the work results from employment" (page 275). " . . . there is still the possibility that publishers can use this provision to pressure authors to become employees rather than work for royalties" (page 446). " . . . what we are thinking primarily of is the independent author . . . not the work made by a staff employee or a worker employee under the usual acceptation of the term of a work made for hire" (page 166).

Beginning in 1965, the copyright revision process turned to other copyright issues, including the emerging copyright areas of cable television and sound recordings.[23] The work for hire issue, except for fine-tuning the categories in Section 101(2), apparently was settled.

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[23] *See*, the 1965 remarks of the then-Register of Copyrights Al Kamenstein that the copyright revision process still had five major areas to work out. Work for hire was not among them. *Hearing Before the Subcommittee on Patents, Trademarks, and Copyright of the Committee of the Judiciary*, U.S. Senate, 89th Congress, 1st Session, August 1965, at 68.

As the Ninth Circuit points out in *Dumas*, 89 Daily Journal D.A.R. at 503, the legislative history of the 1976 Act shows hard-fought negotiations between the creators and marketers of copyrighted works. These interest groups, at the behest of Congress and the Copyright Office, developed a "virtual contract" that became the 1976 Act. Since many of the Act's provisions, including the work for hire sections, affect only these two groups, Congress clearly intended that the Act reflect the negotiated compromises, and that the terms in the Act would mean what the negotiators intended at that time. *Id.* The 1965 compromises – the separation of the definition of work for hire into two sections, one for employees and one for independent contractors; the rejection of a patent law "shop rights" concept for works created by employees; and the limitation, in the second section, of commissioned works that can be works-for-hire to nine categories – reflected the participants' understanding that the term, "employee," referred to a salaried worker and excluded freelance workers entirely. *Id.* This same understanding was intended by Congress a decade later when, without further debate, it enacted the work for hire provisions of the 1976 Copyright Act.

At the time of the work for hire discussions, the law was clear. Only *salaried* employees were considered employees for work for hire purposes. For commissioned works, the law presumed that the independent contractor assigned the copyright to the commissioner of the work. *Altman v. New Haven Union Co.*, 254 Fed. 113 (D.C. Conn. 1918), *Yardley v. Houghton Mifflin Co., Inc.* 108 F.2d 28 (2d Cir. 1939).

It was only after Congress had settled the work for hire issue in 1965 that the courts began to blur the distinction between employees and independent contractors.[24] However, at the time it passed the 1976 Act, Congress made no comment on the then-current state of the case law; rather, it referred back to the compromises of 1965 with approval.[25]

D. Respondent Reid Was Never A Salaried Employee Of The Community For Creative Non-Violence, Nor Was His Sculpture One Of The Types Of Commissioned Works That Can Be A Work For Hire

CCNV commissioned Reid, a skilled sculptor, to create a statue of a modern nativity scene. At no time during the seven-week project was Reid on CCNV's payroll. In

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[24] *See*, for example, *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2nd Cir 1966) (holding that the statutory 1909 work for hire doctrine should apply to independent contractors as well as employees); *see also Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213 (2d Cir.), cert. denied, 409 U.S. 997 (1972); *Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909 (2d Cir. 1974); *Murray v. Gelderman*, 556 F.2d 1307 (5th Cir. 1978).

[25] "The work-made-for-hire provisions of this bill represent a carefully balanced compromise." Congress rejected the "shop right" doctrine called for by screenwriters and composers for motion pictures, whereby an employer would acquire from his employee only those rights needed to conduct his business; the employee would retain all other rights in the work. It adopted the compromise worked out in 1965 regarding the specially ordered or commissioned works that can be works-for-hire. *House Report No. 94-1733*, Sept. 29, 1976, p. 121.

fact, Reid was not paid anything, as he donated his time and talent. *See supra*, Statement of Facts.

As the Court of Appeals below stated in a somewhat different context, but equally applicable here, " . . . we think it evident that Reid was not CCNV's employee, nor do we understand CCNV to contend otherwise." *CCNV*, 846 F.2d at 1494 n.11. (App. 19a).

Since the beginning of this litigation, Respondent Reid has stated that he was not an employee of CCNV and that the sculpture CCNV asked him to create was not covered by any of the categories of 17 U.S.C. Section 101(2), and thus was not a work for hire. *Id.* at n. 10. He respectfully urges this Court, for the reasons set forth herein, to find that he was not CCNV's employee, that his sculpture is not a work for hire, and that he owns the copyright in that sculpture.

III. THE *DUMAS* "FORMAL, SALARIED EMPLOYEE" TEST PROVIDES PREDICTABILITY AND IS SUPPORTED BY RULES OF STATUTORY CONSTRUCTION AND BY THE LEGISLATIVE HISTORY OF THE 1976 ACT; HOWEVER, IF THIS COURT DOES NOT EMBRACE *DUMAS*, THE *EASTER SEAL* AGENCY TEST PROVIDES FAR MORE PREDICTABILITY THAN THE *ALDON* "SUPERVISION AND DIRECTION" TEST AND IS NOT OFFENSIVE TO STATUTORY CONSTRUCTION OR THE LEGISLATIVE HISTORY, AS THE *ALDON* TEST IS

Respondent Reid believes that the best definition of work for hire employee is the "formal, salaried" employee as recently enunciated by the *Dumas* court, *supra*. However, should this Court decline to adopt that

test, we respectfully request that it uphold the court below, rejecting the *Aldon* test and making the *Easter Seal* test the appropriate method to use to determine an employment relationship.

A. The *Easter Seal* Test Provides Greater Predictability Than The After-The-Fact *Aldon* Test

The *CCNV* court explains the *Easter Seal* test as follows:

> Summarily stated, that interpretation reads section 101 as a reflection of a simple dichotomy in fact between employees and independent contractors. In other words, a court should first determine – using agency law rules – whether or not the seller is an employee or an independent contractor. Then, the court should apply the statute. Section 101(1) applies to sellers who are employees. If the work was in the scope of employment, an agency-law employee is a copyright employee, and the employer is the "author." Section 101(2) applies to independent contractors. All works by independent contractors – "work[s] specially ordered or commissioned" – are *not* works for hire unless the work comes within the nine narrow statutory categories *and* parties agree in a signed instrument. Section 101(2) is really statutory *permission* for certain kinds of independent contractors to give "authorship" to their buyers. Id. at 329 (footnote omitted). *CCNV*, 846 F. 2d at 1492. (App. 13a).

"We conclude," the court below said, that the "1976 Act has greatly restricted the scope of the 'work for hire' doctrine." *CCNV*, 846 F.2d at 1485. Unlike the *Aldon* test which expands the categories of works for hire to virtually any work except those in Section 101(2) without a writing, the *Easter Seal* test applies common-law agency

guidelines selectively to determine employment status.[26] Using the indicia suggested by Section 220 of the Restatement, and perhaps additional factors relevant to each individual situation, the parties at the beginning of their relationship would reliably determine their employment status. These specific indicia, unlike the rudderless "supervision and direction" *Aldon* test, provide a framework in which to make that determination.

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[26] Restatement (Second) of Agency:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(Continued on following page)

Moreover, "this interpretation ties the meaning of work for hire to a well developed doctrine in agency law. Although there is no general federal agency law and adopting state agency law would not give copyright law the requisite national uniformity, federal courts can turn to early copyright cases before the encroachment of the *Yardley* rule, and to the general principles embodied in the Restatement of Agency Law, in order to make considered decisions in work for hire adjudication . . . this approach gives buyers and sellers the greatest predictability. In most situations it will not be difficult for a buyer and seller to determine whether the seller is an employee or an independent contractor and to structure their contractual relations accordingly." *Easter Seal*, 815 F.2d at 335.

Thus, the *Easter Seal* agency test provides a workable alternative to the *Dumas* test. Certainly, it is preferable to the open-ended *Aldon* test, under which employment relationships could change in the course of a project, turning independent contractors into employees without their consent.

(Continued from previous page)

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

B. The Legislative History Supports the *Easter Seal* Court's Finding That Congress Intended to Broaden The Rights of Creators In Enacting Section 101(1) and (2)

The Court below correctly noted and found the legislative history clear in its exclusion of independent contractors from the meaning of "employee" and the broadening of protection and rights for creators, citing with approval various scholarly commentary. See, for example, A. Latman, R. Gorman, & J. Ginsburg, *Copyright For The Eighties: Cases and Materials* 242 (1985) ("[d]id the [*Aldon Accessories*] court improperly blur an attempted statutory distinction between works created by 'employees' and specially ordered or commissioned works,' a distinction designed by Congress to give commissioned persons greater copyright ownership rights than they had under the 1909 Act cases?"); Fidlow, *The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification*, 10 Hastings Comm/Ent L.J. 591 (1988); Hamilton, supra, at 1292-93 ("[f]rom a preliminary draft that excluded all commissioned works from the work-made-for-hire rubric, the copyright law revision developed into a final bill wherein only certain, specified categories of commissioned works could be considered as works made for hire.") (footnote omitted).

In recognizing the "bright line" between employees and independent contractors, the *Easter Seal* agency test maintains the dichotomy created by subsections (1) and (2) of Section 101. *Easter Seal*, 815 F.2d at 329, 335.

C. The *Easter Seal* Test Provides a Logical Distinction Between Section 101's Subdivisions (1) and (2) And Provides a "Moral Symmetry"

The Fifth Circuit in *Easter Seal* found that the agency approach "makes sense out of the nine narrow categories in Section 101(2)" and creates a logical distinction between subsection 101(1) and 101(2) of the statute. The Court questioned:

> Why does an author of answer material for a test get special protection from the traditional expansive "work for hire" doctrine when a musician or a sculptor does not? The activities in section 101(2) look like the kind of activities where the buyer normally wants and needs to be a statutory author in order to gain complete initial ownership of a collaborative project. It would be anomalous to give these activities special protection beyond those accorded other types of commissioned works.

Easter Seal, 815 F.2d at 331. *Easter Seal* interprets Section 101(2) as "statutory *permission* to allow certain kinds of independent contractors to sign away their authorship to their buyers." *Id.* at 335. This logical approach allows for a plain reading of the statute.

The court in *Easter Seal* found that "adopting an agency definition of copyright 'employment' creates a certain moral symmetry making a buyer a statutory 'author' only if under agency law he or she would be responsible for the negligent acts of the seller." *Easter Seal*, 815 F.2d at 335. Here, according to the *Easter Seal* court, a buyer will only be the "author" of a writing, for instance, if he or she "would be liable under respondeat superior in a defamation action based on that writing."

Adopting *Easter Seal*'s agency law approach would prevent situations where a party could reap the benefit provided to employers under copyright law without also assuming the responsibilities that an employer must bear under other areas of the law.

IV. NO REMAND TO THE DISTRICT COURT IS NECESSARY TO DETERMINE WHETHER REID WAS AN EMPLOYEE UNDER AGENCY LAW BECAUSE THE UNDISPUTED FACTS, AS FOUND BY THE DISTRICT COURT, ADMIT OF NO OTHER CONCLUSION

CCNV argues that because the Court of Appeals found that the agency law standard was the correct standard to determine the employment status of Reid, that court should have remanded this case to the District Court for a factual determination of the issue. CCNV's Brief at 36.

However, as CCNV concedes, even where the wrong legal standard has been applied, no remand is necessary where the record supports only one resolution of the factual issue. CCNV's Brief at 37. *Pullman-Standard, A Division of Pullman, Inc. v. Swift*, 456 U.S. 273 (1982). Reid submits that application of either the *Easter Seal* agency test or the *Dumas* formal, salaried employee test to the facts as identified by the District Court can result in only one holding: Reid was not an employee of CCNV.

Should this Court determine that the *Dumas* formal, salaried employee test is the proper test and because it is instantly apparent and uncontested that Reid was not such an employee of CCNV, a remand would be unnecessary.

As for the *Easter Seal* agency test, the record in this case is fully developed and for the purposes of the appeal was uncontested. The appellate court thus had a full and uncontested record from which to evaluate the case. It specifically states that it conducted a review under the terms of the Restatement of Agency[27] and found that Reid was not an employee. There were clearly enough facts before the court to allow it to arrive at its ruling. The court, at *CCNV*, 846 F.2d 1494 n.11 (App. 19a), by way of illustration cites four of the criteria it used in its analysis. A simple review of the facts and the Restatement show that under agency rules only one result can be forthcoming.

Furthermore, the two primary cases relied upon by CCNV to support its claim for a remand – *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974) and *Pullman-Standard, supra*, are clearly distinguishable from the facts here.

In *Kelley*, a Federal Employers Liability Act (FELA) case, the court of appeals reversed the district court on the grounds that it used the wrong legal standard, "agent" rather than "servant", to find FELA liability. This Court remanded the case to the District Court so it could "re-examine the record in light of the proper legal standard." *Kelley*, 419 U.S. at 332. This Court noted that the district court apparently had specifically considered but rejected proposed findings tending to show *Kelley* was, in

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[27] *See supra*, at note 26.

fact, a servant for FELA purposes. *Kelley*, 419 U.S. at 325, n. 6.

In our case, there is no indication that the District Court specifically excluded proposed findings that would tend to show Reid was not an agency employee. In fact, for the purposes of his appeal, Reid did not contest the factual findings of the District Court. There simply is no need to re-examine the record here.

Pullman-Standard, supra, is a Title VII discrimination case in which the appeals court reversed the district court and found that there was an intent to discriminate. This Court reversed and remanded to the district court, ruling that discriminatory intent is a factual finding requiring remand to the trier of fact. 456 U.S. at 293.

In *CCNV*, in contrast, the D.C. Circuit Court made no additional factual findings, but relied solely on the findings of the court below.

Not only are *Kelley* and *Pullman-Standard* not applicable to the facts in our case, but the District Court's findings fully support the conclusion that Reid was not an employee of CCNV under either the *Dumas* or *Easter Seal* test.

V. CCNV'S ARGUMENT REGARDING JOINT AUTHORSHIP IS NOT BEFORE THE COURT

In its brief, CCNV argues a fictional fractionalization problem it believes inherent in joint authorship. The issue of joint authorship has been remanded to the District Court and will be appropriately dealt with there and is not before this Court.

However, it should be noted that the concept which CCNV finds so disruptive – joint authors joining in the copyright of works in whose creation they participated – is statutorily provided for in 17 U.S.C. 101.

Further, as a point of clarification, the holding of the Court below did not remand this case for determination as to whether Reid's twelve assistants were joint authors nor did it implicitly recognize that CCNV deserves to be a joint author. Rather, it remanded for a determination of whether anyone had a right to claim joint authorship. CCNV, 846 F.2d at 1499 (App. 28(a)).

Finally, it is quite hypocritical for CCNV to come before this Court and argue that for artists to be able to make-an-after the-fact claim of joint authorship in a work is disruptive, yet seek to reserve for themselves the after the fact right to claim copyright ownership under the work for hire doctrine. Like the remainder of CCNV's arguments, this argument also must be rejected.

CONCLUSION

The Court of Appeals was correct in finding that James Earl Reid was not a work for hire employee under 17 U.S.C. Section 101 and its finding should be affirmed. The formal salaried employee test as set forth in *Dumas* is the correct one for determining who is a work for hire employee. However, as between the remaining alternate tests of *Easter Seal* and *Aldon*, the preferred approach is *Easter Seal*. Finally, under neither a *Dumas* nor *Easter Seal* analysis would a remand be necessary.

Respectfully submitted,

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COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Petitioners,

v.

JAMES EARL REID,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 88-293

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Petitioners,
v.
JAMES EARL REID,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

Once again Respondent has changed his definition of what constitutes a work for hire employment relationship. Before the District Court, he agreed with Petitioners that the relevant question is whether CCNV had the right to control the production of "Third World America"; thus, with both parties in agreement, the case was tried on the basis that the 1976 Copyright Act did not change the established judicial definition of copyright employment. Petitioners' Br. 10. When he lost on the facts, Reid shifted before the Court of Appeals to an agency law definition. Now, perhaps recognizing that agency law also turns on control,[1] he advances before

[1] *See* Brief Amici Curiae of the American Soc'y of Magazine Photographers *et al.* in Support of Respondent ("ASMP" Br.) 27-28 (objecting to common law agency definition because it turns on control); Petitioners' Br. 36-40.

this Court a third definition—that only "formal, salaried employees" may be work for hire employees.

Reid is not alone in his inconsistency. Until a few weeks ago, the Copyright Office repeatedly advised Congress and the public that:

> —The Copyright Act of 1976 retains intact the "historic" judicial approach to determining the existence of a work for hire employment relationship.
>
> —The "crucial question" in such cases is whether the employer "has the right to direct and supervise how the work is performed, and not the nature of compensation paid to an employee."
>
> —The term "employee" in the 1976 Act is *not* confined to "formal, salaried employees."
>
> —It would be unwise, as a matter of policy, to adopt a "formal, salaried employee" amendment to the 1976 Act. Such an amendment would represent a "marked departure" from what has been the "best guideline for regulating employer-employee rights"; it would seriously disrupt "long-standing business practices"; and it would create potential "loopholes" where works are prepared for "voluntary societies . . . ."[2]

Countless numbers of business relationships have been predicated upon the above guidance from the Copyright Office. But now, on the eve of Congressional hearings to consider amendments to the work for hire provisions, the Copyright Office has changed its policy and has done a complete about-face on what the 1976 law means. The Copyright Office has used its amicus brief before the

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[2] Letter from Register of Copyrights to Senator Cochran, dated Aug. 21, 1986 (Appendix hereto 1a-2a); Letter from Associate Register of Copyrights for Legal Affairs to Senator Cochran, dated Jan. 25, 1983 (Appendix to Petitioners' Br. 5a-6a). The same guidance has been communicated to the public generally through various Copyright Office publications, *see* Petitioners' Br. 42-43 n.21, and letters to private parties.

Court to announce the repudiation of its long-held interpretation of the 1976 Act's work for hire provisions.[3]

Certain of the artist organizations supporting Reid also assert views of the 1976 Act at odds with those they advanced in 1982, when they unsuccessfully urged Congress to enact a "formal, salaried employee" amendment. *Compare Hearings Before the Senate Comm. on the Judiciary on S. 2044*, 97th Cong., 2d Sess. 40-41 (1982) ("1982 Hearings") (statement of ASMP and Graphic Artists Guild that common law standards "must be used" under the 1976 Act), *with* ASMP Br., *supra* note 1. Like Reid and the Copyright Office, they have suddenly discovered a new and different Congressional "intent." This born-again approach to statutory construction, however, is predicated upon dissatisfaction with the law as written in 1976 (*see generally* 1982 Hearings at 2-47), and upon policy considerations which were not presented to Congress during its consideration of the 1976 copyright revision legislation and which, to date, have not been accepted by Congress.

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[3] The Copyright Office brushes aside its flip-flop with nothing more than the casual observation—in a footnote—that its guidance to Congress and the public (provided repeatedly over the years) was not based on a "detailed examination" of the Act. Copyright Office Br. 9 n.5.

For more than a decade, some two dozen different courts considered the meaning of the work for hire provisions in the 1976 Act before any court saw fit to adopt the "formal, salaried employee" approach; only one court has done so. *See Dumas* v. *Gommerman*, No. 87-6542 (9th Cir. Jan. 13, 1989). The Copyright Office insists, however, that the Act is *clear on its face* and admits of *no construction* other than the "formal, salaried employee" theory. Copyright Office Br. 9-12. Apparently, a "detailed" examination of the Act is not necessary.

The Copyright Office's current interpretation, based on a last minute change of views, is not entitled to any significant weight. *Securities Industry Ass'n* v. *Board of Governors of the Federal Reserve System*, 468 U.S. 137, 143-44 (1984).

Perhaps now, with the change in position of the Copyright Office, Congress will alter the historic judicial approach and will adopt some type of "formal, salaried employee" amendment. But Congress did not do so in the 1976 Act. All of the eleventh hour vacillation in legal theories confirms that Congress was never requested—and never intended—in the 1976 Act to "radically revise," *CCNV*, 846 F.2d at 1494, the settled interpretation of what constitutes an employment relationship under the copyright laws.[4] In urging the Court, rather than Congress, to make such a "radical revision," Reid and his amici provide an incomplete and misleading picture of CCNV's position; the nature and implications of their "formal, salaried employee" approach; the legislative history of the 1976 Act; and the state of legal commentary on this issue.[5]

A. Respondent Has Mischaracterized CCNV's Position

Reid and his supporters attack a position which CCNV never advances. They assume that "Third World America" is a "commissioned work"—an assumption predicated upon a definition of that term so expansive that it would include even works of "formal, salaried" employ-

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[4] The Court has been reluctant to give a new meaning to the copyright laws in the absence of clear Congressional guidance. *See Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Teleprompter Corp.* v. *CBS, Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968).

[5] It is, of course, the responsibility of Congress to balance the conflicting policy considerations raised by the Copyright Office here with those advanced by the Copyright Office before Congress in the past. However, nothing in the historic judicial approach, as advocated by CCNV, precludes parties from agreeing at the outset on their rights. Where the parties fail to do so, the same guidelines that the courts have applied for years will be available to determine the existence of an employment relationship.

ees.[6] They then incorrectly attribute to CCNV the argument that commissioned works may be placed into the employment category of Section 101(1) whenever the creation of such works is supervised by the hiring party. Copyright Office Br. 6.

CCNV has not argued that "specially ordered or commissioned works" come within subdivision (1). Nor, contrary to the Copyright Office Br. 7, does the Second Circuit in *Aldon* suggest that "commissioned" works may be "employee" works. CCNV does not dispute Reid's view that Congress intended to draw a line between works prepared by an "employee within the scope of his employment," on the one hand, and works "specially ordered or commissioned," on the other. The question here is whether "Third World America" falls on the employment side of that line.

"Third World America" may be labelled a "commissioned work" only by disregarding the trial record and findings of the District Court. The relationship between Reid and CCNV was characterized by the hallmarks of any "traditional" employment relationship (particularly when accounting for CCNV's status as a non-profit, voluntary association of individuals)—

> —During a seven-week period, Reid worked exclusively for CCNV. He worked on a full-time basis sculpting his portion of "Third World America,"

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[6] The Copyright Office defines a commissioned work as one "created upon the order or request of a party other than the author." Copyright Office Br. 10. It also quotes 1 *Nimmer on Copyright* § 5.03[B][2][d] at 5-26 (1988), to the effect that: "In the ordinary case where one person is requested by another to prepare a copyrightable work, a commissioned relationship exists." The Copyright Office omits the next sentence from Nimmer: "The surrounding circumstances, however, may indicate that this is not the case." *Id.* CCNV's position is that, under all the "surrounding circumstances" of this case, an employment—not commissioned—relationship existed between CCNV and Reid.

while others, with CCNV, completed the remainder of the work.

—CCNV (in periodic installments) paid all of Reid's expenses, which he claimed totalled $15,000. CCNV paid, *inter alia*, the rent on his studio; the cost of the services of Reid's dozen "assistants"; and the costs of materials.

—In return for payment of his expenses and other consideration (identification with a well-publicized work and worthwhile cause), Reid said he would volunteer his services and forego a "salary" as such. In this regard, Reid was treated no differently from anyone else who is a member of or otherwise volunteers to assist CCNV in finding creative means to help the homeless.

—CCNV set the schedule that Reid was required to meet. When Reid missed the initial deadline, his offer to release "Third World America" "as is" was rejected by CCNV, and he was told to complete the work in a "first class" manner.

—CCNV closely monitored each stage of Reid's progress, by requiring him to submit sketches and photographs of his work; frequently inspecting the progress of the work; having Reid visit the streets of Washington, D.C. to observe the homeless in the setting CCNV wished to capture; and maintaining a constant liaison with Reid through the artist Tom Lewis, whom CCNV initially contacted about preparing "Third World America."

—From the outset, CCNV defined in detail the nature and scope of the project and Reid's role. Every significant aspect of "Third World America" was directed by CCNV. Throughout, Reid followed each of CCNV's instructions. He produced precisely what CCNV, not he, wanted in order to convey the message CCNV intended.[7]

[7] Reid complains that, under CCNV's view, he was "involuntarily" and "unknowingly" converted from an "independent contractor" to an "employee." Respondent's Br. 8-9, 13-14. There was nothing involuntary or unknowing about Reid's acceptance of not only CCNV's financial and creative support, but of CCNV's supervision and control as well. Furthermore, as the District Court's findings establish, the entire "tenor of the enterprise" was such that Reid must have known from the outset that CCNV—not he— had the right of "artistic control" over "Third World America." *CCNV*, 652 F. Supp. at 1455 n.3.

Under the historic judicial approach (which focuses on the totality of circumstances with the right to control as the critical factor), Reid and CCNV unquestionably had an *employment*, not commissioned, relationship. The District Court so found; the Court of Appeals (in dicta) agreed with that finding; and neither Reid nor anyone else has challenged that finding before this Court. For the reasons set forth in CCNV's opening brief, the 1976 Act maintains this historic approach. *See* Petitioners' Br. 18-30. However, the circumstances of this case also satisfy the Fifth and D.C. Circuits' agency law approach and the Ninth Circuit's "formal, salaried employee" approach. *See* Petitioners' Br. 38-40, 43; pages 8-10 *infra*.

B. The "Formal, Salaried Employee" Theory Does Not Have The Benefits Or Effect Alleged By Respondent

Reid and his amici tout the newly-discovered "formal, salaried employee" approach as a "bright line" standard with a "simple," "well-understood" meaning. Each, however, offers a different definition of a "formal, salaried employment" relationship. Reid maintains that such a relationship exists only if the artist: 1) is hired "at a regularly paid salary"; 2) works over a "long, indefinite time period"; and 3) "often" receives "benefits such as health insurance, paid vacation, sick leave and retirement." Respondent's Br. 24. The Copyright Office, on the other hand, insists that the artist: 1) work on more than one project; 2) have an "ongoing relationship" with the hiring party, "involving a specific stream of services"; and 3) not be "free to create like works for others." Copyright Office Br. 10-12.[8] The Copyright Of-

[8] Respondent does not accept this definition. He specifically refers to Tom Lewis, the homeless activist artist who served as a liaison

fice argues that "Third World America" is not an employee work because Reid and CCNV had no "business relationship" before or after the work's production. *Id.* at 12.[9]

Reid and his amici urge the Court to adopt *Dumas* v. *Gommerman*, No. 87-6542 (9th Cir. Jan. 13, 1989). But the Ninth Circuit advances still another set of factors. The Ninth Circuit does not adopt the Copyright Office's "single project" theory; nor does it accord decisional

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between Reid and CCNV, as "Reid's employee," Respondent's Br. 3 n.2—even though Lewis was hired solely to work on "Third World America" and had no "ongoing relationship" with Reid.

The Copyright Office's third criterion begs the question; whether the artist is free to create similar works will, of course, depend upon who owns the copyright in the original work.

[9] The same might be said even with "formal, salaried employees" —such as where they are hired to work on a single project, or quit or are fired after working on one project. The Copyright Office's single project exclusion is predicated upon what it claims to be the "ordinary meaning" of the term "scope of employment." This so-called "ordinary meaning" would immunize from tort liability every employer whose employees work only on a single project. *See* Restatement (Second) of Agency § 219 (1958) (employer liable for acts of employees within "scope of their employment"). It also would produce absurd results in other areas of copyright. *See* 17 U.S.C. § 108 (exempting from copyright infringement liability libraries whose "employees" photocopy works "within the scope of their employment"); 17 U.S.C. § 105, 101 *discussed in* Petitioners' Br. 34-35 (works of government employees within scope of their employment are not copyrightable).

Contrary to the new definition proposed by the Copyright Office, the term "scope of employment" was simply intended to "make it clear that works created by an employee on his own initiative outside of his employment, are not included" within the work for hire definition. B. Varmer, *Works Made for Hire and on Commission*, Copyright Office Study No. 13, 86th Cong., 2d Sess. 141 (Comm. Print 1960) ("1958 Varmer Study"). *See also id.* at 140 & n.52 (one may be an "employee" even if hired "specifically for the purpose of making a particular invention").

significance to Reid's "salary and benefits" criteria. The Ninth Circuit says that the courts must look to

> such things as (1) whether the artist worked in his or her own studio or on the premises of the buyer; (2) whether the buyer is in the regular business of creating works of the type purchased; (3) whether the artist works for several buyers at a time, or exclusively for one; (4) whether the buyer retains authority to assign additional projects to the artist; (5) the tax treatment of the relationship by the parties; (6) whether the artist is hired through the channels the buyer customarily uses for hiring new employees; (7) whether the artist is paid a salary or wages, or is on a flat fee; and (8) whether the artist obtains from the buyer all benefits customarily extended to regular employees.

Dumas, slip op. 319 (footnotes omitted). Ironically, the Ninth Circuit claims to reject the agency law test in defining the term "employee"; yet, several of the *Dumas* factors are taken directly from the Restatement (Second) of Agency § 220 and are satisfied in this case. *See* Petitioners' Br. 40 n.19. The Ninth Circuit also claims to reject supervision and control as a factor, saying it would not "ordinarily" be relevant. *Dumas*, slip op. 319. Yet, one of the *Dumas* factors—(5) tax treatment—would be determined, under relevant IRS regulations, by whether the hiring party has the right to control and to direct the artist's work.[10]

The commentary on which Reid and the Copyright Office rely also does not support either of their definitions. *See, e.g.*, Hardy, *Copyright Law's Concept of Employment—What Congress Really Intended*, 35 J. Copyright Soc'y 210, 250 & n.169 (1988) (concluding that "free-lance" artist in *Sigwart* v. *Ringling Brothers*, 1984 Copy-

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[10] *See* 26 C.F.R. § 31.3401(c)-1(b) (1988) (Federal Withholding Tax); 26 C.F.R. § 31.3121(d)-1(c) (1988) (FICA); 26 C.F.R. § 31.3306(i)-1(b) (1988) (Federal Unemployment Tax).

right Law Dec. (CCH) ¶ 25,717 (C.D. Cal. 1984) was a "formal, salaried employee" of an advertising agency—even though that "freelancer" worked only four weeks for the agency and on a single advertising project).[11]

In short, the "formal, salaried employee" approach does not provide greater certainty than the historic judicial approach. It simply emphasizes somewhat different factors which must be taken together and evaluated by the trier of fact to determine the existence of an employment relationship; there is no consensus on the nature or weight to be attributed to the possible factors. Under these circumstances, it would be particularly inappropriate for the Court to displace the historic judicial approach with one whose dimensions are completely unknown—and thereby upset years of business relationships predicated upon Copyright Office guidance and case law.

C. Respondent Has Provided An Incomplete And Misleading Picture Of The 1976 Act's Legislative History

1. The Copyright Office contends there is no "evidence that Congress actually intended to enact the [historic] judicial definition of 'employment' . . . ." Copyright Office Br. 23. But, the House and Senate Judiciary Committees expressly stated that the 1976 Act "adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work . . ." and that this principle is "well established in American copyright law." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976) ("1976 House Report"); S. Rep. No. 473, 94th Cong., 1st Sess. 104

[11] *See also* W. Patry, *Latman's The Copyright Law* 122, 125 (6th ed. 1986) (Subdivision (1) is "limited to salaried *or like employees*." Noting that the "gray areas" may be resolved by reference to the treatment of the individual for "tax and related purposes," author cites certain state employment statutes; the Restatement of Agency; and judicial authority for the proposition that "a volunteer may be [a work for hire] employee") (emphasis added).

(1975). These are not the statements of a Congress intent upon "radically revising" existing law on copyright employment. *See Aldon*, 738 F.2d at 552.

Absent from the Copyright Office brief (as well as from the briefs of Reid and all his amici) is any mention, let alone discussion, of the above report language. The Copyright Office likewise avoids reference to the statement of one of its former Registers that the 1961 Register's Report "in essence recommends that the present law be retained." Petitioners' Br. 26. *See also* pages 14-15 & n.17 *infra* (statements of involved parties not considered by Reid and Copyright Office).[12]

Reid and his amici assert that Congress in 1976 did adopt the existing law, but only as it existed up to 1965. *See* Respondent's Br. 36-37, 41; Copyright Office Br. 13-15. They argue: 1) prior to 1965 the courts had applied work for hire "only," "solely" and "exclusively" to "regular, salaried employees," Copyright Office Br. 8, 13, 24; and 2) the case law to which CCNV points did not develop until after 1965—the year in which Reid says Congress became oblivious to all further judicial authority in this area. Again, these assertions are belied by the facts which Reid and the Copyright Office fail to consider.

As a former Register of Copyrights noted in 1960 and 1963, the courts had *not* confined work for hire to "salaried" employees. Petitioners' Br. 27 n.10. Furthermore, as Professor Nimmer observed, the historic judicial approach (which focuses upon the right to control in determining employment for copyright purposes) was

[12] Contrary to the impression left by the Copyright Office Br. 23 n.18, Congress *expressly* identified instances in which it intended to overrule existing law. *See* 1976 House Report at 52 (form of fixation); *id.* at 64 (definition of "publicly"); *id.* at 88-89 (definition of "performance"); *id.* at 124 (distinction between copyright and material object); *id.* at 157 (registration as prerequisite to infringement action).

settled well before 1965. *Id.* at 26-27. Indeed, the Register of Copyrights noted in his August 21, 1986 letter to Congress that the "historic standard of the right to supervise and determine the final work" is a guideline that "has been part of our copyright laws for almost 100 years." Appendix hereto 2a.[13]

2. It would not have been difficult for Congress to place the adjectives "formal" and "salaried" before the word "employee" in Section 101(1). But no reference to "formal, salaried employees" can be found in the Act or, for that matter, in any of the seven Congressional committee reports or the four Register of Copyright reports generated in connection with the copyright law revision process. No instance can be found where any

[13] In *Tobani* v. *Carl Fischer, Inc.*, 36 U.S.P.Q. 97 (S.D.N.Y. 1937), *aff'd as modified on other grounds*, 98 F.2d 57 (2d Cir.), *cert. denied*, 305 U.S. 650 (1938), the district court held that an arranger of musical compositions (who initially was paid a "salary" but later received compensation on a "piece price basis") was an employee under the 1909 Act's work for hire provision (for each of his works, including those prepared while not on salary). The court reasoned:

> Tobani was employed for the specific purpose of making arrangements for musical compositions; *he was at all times under the direction and supervision of Fischer; his work was invariably performed in connection with a particular arrangement or assignment*; and he was fully paid for his services .... It is idle, therefore, to try and spell out of the relation anything more than an ordinary hiring for pay.

36 U.S.P.Q. at 98 (emphasis added).

Reid and his amici obfuscate the issue by claiming that CCNV relies upon a line of cases beginning with *Brattleboro Publishing Co.* v. *Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966), which held that any *commissioned* work is a work for hire. *See* Copyright Office Br. 23-25 & n.22. CCNV, however, has already made clear that it does not—and need not—contend that this separate line of cases was incorporated into the 1976 Act. *See* Petitioners' Br. 29-30; Petition for Writ of Certiorari 19-20; *accord Aldon*, 738 F.2d at 552.

party, during the several Congressional hearings from 1965 to 1973, testified that the term "employee" should mean only "formal, salaried employees." This notion was not advanced during any of the floor debates. Likewise, one searches the 1976 legislative record in vain for any reference to the "predictability" policy arguments now advanced by the Copyright Office and Reid. Artists were instead concerned about retaining copyright where they prepare a work of their "own independent creation" and the hiring party does nothing more than "asks or suggests" that the work be prepared or simply "pa[ys] the money" for the work.[14]

Reid and his amici rely upon remarks made by certain lobbyists during discussions with the Copyright Office in 1963 and 1964. Respondent's Br. 34-35; Copyright Office Br. 16.[15] Their position is that Congress in 1976 understood the term "employee" to mean only what the lobbyists had in mind some twelve years earlier—not what the courts had said as of the time the 1976 Act was passed. But the snippets quoted by Reid and the Copyright Office provide a misleading impression. With one exception, each remark was made orally during roundtable discussions with the Copyright Office—

[14] *See Preliminary Draft for Revised U.S. Copyright Law and Discussion and Comments on the Draft*, 88th Cong., 2d Sess. 274 (Comm. Print 1964) ("1963 Preliminary Draft and Comments"); *Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law*, 89th Cong., 2d Sess. 313 (Comm. Print 1964) ("1964 Further Discussion"); *1964 Revision Bill with Discussion and Comments*, 89th Cong, 1st Sess. 147-48 (Comm. Print 1965) ("1964 Revision Bill and Comments").

[15] Reid also cites a witness who testified during the 1965 House Hearings. *See* Respondent's Br. 35. But this witness explicitly recognized that the term "employee" is broader than "staff employee" and also includes "a worker employee under the usual acceptation of the term 'a work made for hire.'" *Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary on H.R. 4347 et al.*, 89th Cong., 1st Sess. 166 (1965). Reid also mistakenly relies upon the 1958 Varmer Study, on which CCNV already has commented. Petitioners' Br. 27 n.10.

discussions which the Register of Copyrights assured the participants would be "informal" and "unofficial." 1963 Preliminary Draft and Comments at 256 (statement of Abraham Kaminstein); *see also id.* at Foreword (Chairman of House Judiciary Committee cautioned that the "committee neither approves nor disapproves any of the views expressed" in these discussions). This Court has properly refused to accord significance to statements of this nature. *See Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986).[16]

Furthermore, not one of the remarks cited by Reid was addressed to the question how the term "employee" should be defined in the work for hire provisions. Rather, in each case, the speaker was advancing the extreme case to support an argument concerning other matters. For example, the book publishers' representative, Horace Manges, urged the Copyright Office not to exclude commissioned works from the work for hire definition; he argued that otherwise there "would be a necessity of putting people on the payroll." 1963 Preliminary Draft and Comments at 259. Manges may have considered it "necessary" to place people "on the payroll" because he believed that to be the clearest way of evidencing an employment relationship; but, as the courts have recognized, it is not the only way. Irwin Karp of the Authors League thus sought to allay "Mr. Manges' alarm and concerns," by assuring that the Register's recommendations would not change existing law. As Karp explained, there should be no

> quarrel with the distinction between works written under employment for hire and works made on commission. [*The Copyright Office is*] *merely reflecting here in the statute what the courts have said as to what the phrases mean.*

Id. at 262 (emphasis added).[17]

In any event, even if all the lobbyists had "understood" that "employee" means only "formal, salaried employee" —and even if they were all of one mind as to what this term was to mean (*but see* pages 7-10 *supra*)—they failed to incorporate their "understanding" into their 1965 compromise agreement upon which Reid and the Copyright Office rely. *See* Copyright Office Br. 25 n.22 (work for hire provisions "reflect exactly the [1965] compromise"); Respondent's Br. 35-37; ASMP Br. 7. Nothing in that agreement provides any definition whatsoever of the term "employee"—let alone one that repudiates the historic judicial approach.

3. According to the Copyright Office, Congress accorded special status to certain categories of commissioned works in subdivision (2) because those works, like

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[16] The notion that the Copyright Act should be construed in accordance with the understanding of the private parties is advanced in Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857 (1987)— relied upon extensively by Reid, his amici and the Ninth Circuit in *Dumas*. As Professor Litman acknowledges, her theory is at odds with the Court's decision in *Mills Music, Inc.* v. *Snyder*, 469 U.S. 153 (1985). Litman, *supra*, at 902 (Court construed the 1976 Act differently from the private parties during their discussions with the Copyright Office); *see* Brief for Respondents in *Mills Music* 38-42 (relying upon statements of such parties).

[17] Leon Kellman of the American Guild of Authors aligned himself with Karp: "There has been much litigation and many disputes as to whether or not the writer wrote it as an employee for hire. The circumstances under which a songwriter or musician will work for a publisher or other musical organization may be quite loose. He may work in various capacities. He may work nonexclusively." *Id.* at 268. *See also id.* at 274 (statement of counsel that courts had found work for hire employment relationships where the artist "receives compensation and is subject to control and regulation by the person for whom he performs the work"); *Hearings Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary on S. 597*, 90th Cong., 1st Sess. 895 (1967) ("Let it not be assumed that employment for hire necessarily means that the composer is provided with a steady job carrying an annual income. On the contrary, that kind of situation is as rare as uranium.").

employee works, are "'prepared at the employer's initiative and risk and under his direction.'" Copyright Office Br. 20, *quoting* H.R. Rep. No. 2237, 89th Cong., 2d Sess. 116 (1966) ("1966 House Report").[18] The Copyright Office's reliance upon this passage is made in a vacuum, without considering the very nature of the subdivision (2) categories—all of which involve composite works with multiple contributors (such as movies and encyclopedias).

A publisher, for example, may "direct" the overall compilation of an encyclopedia containing thousands of individually copyrightable works. However, his relationship to each of the thousands of contributors would not likely satisfy the historic test of employment in each case. *See* Petitioners' Br. 33 & n.14. Thus, as the legislative history reflects, subdivision (2) is necessary to avoid the intense practical difficulties associated with potentially different copyright owners for each of the several works which are part of a composite work.[19] That Congress accorded special status to certain commissioned works in subdivision (2) does not mean that Congress intended to abandon the historic test for determining the existence of subdivision (1) employment relationships.

D. Respondent Has Inaccurately Portrayed The State Of "Scholarly Commentary"

To support his contention that the "scholars" have "overwhelmingly" rejected the historic approach reflected

[18] A careful examination of the 1966 House Report shows that the Committee was summarizing an argument made by publishers on this point. Contrary to the Copyright Office's representation, the Committee did not "state" its agreement with this argument. The passage quoted by the Copyright Office does not appear in the final 1976 House Report—or in any of the House or Senate committee reports issued after 1967.

[19] *See, e.g.*, 1965 House Hearings at 1458; 1964 Further Discussion at 279-89; 1964 Revision Bill and Comments at 149-50; 1958 Varmer Study at 141.

in *Aldon*, Reid cites articles written by counsel for some of his own amici; counsel for the losing party in *Aldon*; and certain others. Respondent's Br. 17-19. He then recites the same commentary as advocating a "formal, salaried employee" approach. *Id.* at 26-27. According to the Copyright Office, "every commentator" has concluded that all parties intended "subdivision (1) to refer solely to regular, salaried employees." Copyright Office Br. 16-17.

These claims might have credibility only if one ignores much of what has been written in the area, including the most authoritative treatise on copyright law. Professor Nimmer, in a passage disregarded by Reid and his allies, rejects the view that subdivision (1) refers only to "formal, salaried employees":

> *In determining whether a work is written in an employment relationship, it is unimportant whether or not the putative employee is a regular or formal employee*, and the nature of the compensation paid to the writer is not necessarily determinative. Thus one may be an employee regardless of whether he is paid on the basis of a conventional periodic salary . . . or even if the writing is done as an accommodation with no compensation at all. *The crucial question in determining an employment relationship is whether the alleged employer has the right to direct and supervise the manner in which the writer performs his work.*

1 *Nimmer on Copyright* § 5.03[B][1][a] (1988) (emphasis added). As Professor Nimmer also recognizes, the law on this point is the same under the 1976 Act as under the 1909 Act. *See* Petitioners' Br. 26-27.[20]

[20] *Accord* Angel & Tannenbaum, *Works Made for Hire Under S. 22*, 22 N.Y.L. Sch. L. Rev. 209, 239 (1976) (Courts construing 1976 Act should "follow the guidelines established by prior decisions which hold, *inter alia*, that to qualify as a work for hire, the employer or other person must possess the power or right to supervise and direct the creation of the work"); Stein, *Termination of Transfers and Licenses Under the New Copyright Act: Thorny Prob-*

Virtually all of the commentary on which Reid relies was published during the last few years, and only after artist groups petitioned Congress in 1982 to adopt a "formal, salaried employee" amendment. The commentators who considered the matter at the time of passage of the 1976 Act took a different view, recognizing that the 1976 Act codifies prior law on the meaning of a work for hire employee. *See* note 20 *supra*. Like Reid, the Copyright Office and various artist groups, "scholars" sympathetic with artists have suddenly discovered a Congressional "intent" which never existed.

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lems for the Copyright Bar, 24 U.C.L.A. L. Rev. 1141, 1174-75 (1977) (1976 Act's "definition of a work made for hire in the employer-employee situation essentially codifies existing law" where an "important indicium of such an employment relationship is whether the 'employer' has the right to direct and supervise the work of the writer-employee"); 1980 ABA Sec. Patent, Trademark and Copyright L. Rep. 153 (it is "assumed" that subdivision (1) "will be construed in accordance with decisional law under the 1909 Act"); H. Henn, *Copyright Law* 72 (2d ed. 1988) ("[T]he basic question [is] whether the alleged employer controlled or had the right to control the manner in which the writer performed the services"); W. Strong, *The Copyright Book: A Practical Guide* 26 (1981) (Full-time staff writer is clearly a work for hire employee. "But what about someone who is hired for a single project, paid by the job—or not paid at all—and dismissed? The critical factor here would be the extent of the employer's control over the person's work.") (footnotes omitted); N. Boorstyn, *Copyright Law* 84 (1981) ("The power to control or supervise the employee's work is the 'hallmark' of an employee for hire relationship") (footnote omitted).

CONCLUSION

The efforts of artists to replace the existing judicial approach (which focuses on creative control) with a different approach (which focuses on the economic benefits accorded the artist) should be directed to Congress, and not to this Court. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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March 8, 1989

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APPENDIX

APPENDIX

August 21, 1986

The Honorable
Thad Cochran
326 Senate Russell Office Building
Washington, D. C. 20515

Dear Senator Cochran:

I write in response to your request for Copyright Office review of S. 2330—the "work for hire" bill that you introduced in the second session of the 99th Congress.

The Office applauds your effort to help the artist get a fair shake and generally shares your view that the purpose of the work for hire provisions of the Copyright Act is to protect the rights of authors and creators while providing to publishers the usage rights their financial and editorial support warrant. The relationship between creators of copyrighted works and the entrepreneurs who disseminate the works is a significant matter of continuing concern.

I will summarize each section of the bill, and then comment on the change it would make in the existing law.

Works By Employees

First, S. 2330 proposes to substantially narrow the definition of "employer" in § 101(1) of the Act. That section presently states that a "work made for hire" is "a work prepared by an employee within the scope of his or her employment." 17 U.S.C. § 101(1) (1976). The bill would add the following requirements: the employee must receive all employment benefits due under state and federal law, and the employer must withhold taxes from such payments to the employee and pay them to the Internal Revenue Service.

The Copyright Act does not define when a work is made by "an employee within the scope of his or her

employment;" instead this is left to private contractual relations and the general law of agency. However, the employer has been considered the author of works made for hire since before the 1909 copyright law. Copyright Law Revision Study 13, S. Judiciary Comm. Print (1960). In any event, the crucial question in determining an employment relationship for purposes of "work for hire" is whether the employer has the right to direct and supervise how work is performed, and not the nature of compensation paid to an employee. *See* 1 M. Nimmer, *Nimmer on Copyright* § 5.03(B) (1985 ed.).

The work for hire provisions of the current Act are the result of a very thorough, comprehensive consideration of the relative positions of creators and disseminators of copyrighted works during the general revision of the law. Particularly during the mid-1960's and again in 1975, the arguments for each side regarding presumptions of ownership were aired fully. The historic standard of the right to supervise and determine the final work would seem the best guideline for regulating employer-employee rights. Moreover, the proposed definition would seem to create loopholes: neither foreign creators nor creators who "work" for voluntary societies appear to be covered. Who owns the copyright in such works? Their number is not insignificant. On balance, with only eight years of experience under the 1976 Act, neither the existing commercial practices nor the judicial decisions including *Aldon Accessories, Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir. 1984) justifies this marked departure from a guideline that has been part of our copyright laws for almost 100 years.

Commissioned Works

Second, the bill would substantially limit the categories of works which could be considered "made for hire" based on being specially ordered or commissioned. Indeed, the sole remaining category which could be specially ordered or commissioned as a work for hire would be works used as part of a motion picture.

The present law includes, in § 101(2), contributions to collective works, parts of a motion picture or other audiovisual work, translations, supplementary works, compilations, instructional texts, tests, answer material for tests, and atlases. The Copyright Act attempts to balance the competing interests of both creators and disseminators of specially ordered and commissioned works and provide safeguards for both. The specific categories of commissioned works that may be considered "made for hire" were arrived at only after extensive debate and represent considerable compromise. *See* H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 121 (1976). The proposed bill would upset these compromises by excluding categories other than works used as part of a motion picture. It could also create confusion by separating motion pictures from audiovisual works, a category that presently includes motion pictures as well as other works that consist of a series of related images intended to be shown by the use of projectors or like devices. This separation is not made elsewhere in the statute.

When Must a Work For Hire Contract be Signed

S. 2330 proposes amending the law to require that before a specially ordered or commissioned work is considered "for hire," the parties must agree on this for each such work in a separate written instrument signed by them prior to commencement of any work.

Section 101(2) of the current law states that any of the designated categories of specially ordered or commissioned works may be considered a work made for hire "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." Although the law does not specify a time frame within which work for hire agreements must be signed, it was clearly the drafter's intent that

such agreements should not be permitted after the work was completed. Thus, in principle the Office would support a clarification that would confirm the original intent of the Act. However, we believe the specific proposal in S. 2330 unnecessarily restricts the scope of commissioned works for hire by providing that once "any work" has begun, the resulting work could never be considered a commissioned work for hire. Conceivably, an idea or theme would be enough work to prevent the ultimate result from being considered a commissioned work for hire.

In our view, a more appropriate amendment to accomplish the intended purpose would foreclose creation of a substatnial part of the work before execution of the written agreement, if the work is to be deemed one made for hire.

Joint Work

The bill would amend the definition of "joint work" in § 101 of the Act, by requiring that for a specially ordered or commissioned contribution to be considered part of a joint work, it must meet the existing definition and for each such contribution the parties must agree in a separate written instrument signed prior to commencement of any creative work that the resulting work shall be considered a joint one.

The current law defines a joint work as one "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." The presumption of joint authorship for works qualifying under the definition is beneficial to authors because it gives them co-ownership rights as to the entire work. Section 201(a), 17 U.S.C. The proposal in S. 2330 seems contrary to the interests of many authors, since, in the case of commissioned works, it would create another condition—a written agreement executed prior to commencement of any work—before a work could be regarded as a "joint

work." As drafted, this provision impacts all specially ordered or commissioned contributions, whether they are "works made for hire" or not. If the contribution is not one for hire, it seems clearly against the author's interest to create an added hurdle to treatment as a joint work. Moreover, the duration of copyright in a joint work *not made for hire* continues for fifty years after the death of the last surviving author. By contrast, the copyright in a work made for hire endures only for the shorter term of seventy five years from publication or one hundred years from creation.

The Office would not support the introduction of a new presumption that two or more works are separate unless the parties agree otherwise in a separate written instrument signed prior to the commencement of any work that they are intended to be joint works. Moreover, for the reasons stated above, the Office believes that it would unnecessarily restrict the concept of joint works by providing that once "any work" has begun, the resulting work could never be considered a joint work, absent the proposed written agreement.

Contributions to Collective Works

The bill further proposes amending § 201(c)—which now provides that copyright vests initially in the author of a separate and independent contribution to a larger work—to include contributions to compilations, supplementary works, instructional texts, and parts of audiovisual works other than motion pictures.

Section 201(c) of the present law addresses a problem peculiar to periodical and collective work publishers. These publishers annually deal with hundreds or perhaps thousands of contributions by individual authors. To require a written contract for each transaction that would give the publisher merely the right to publish the work would create a paper nightmare. Therefore, if a publisher of a collective work needs only the limited

rights provided in section 201(c), no written agreement is required. Section 201(c) specifically provides that absent an express transfer of copyright, "the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." Inherent in this provision is the principle that the copyright in an individual contribution is separate from the copyright in a collective work. Absent an employment for hire agreement, or other contractual arrangement, the owner of a collective work is presumed to acquire only first reproduction rights and the right to reproduce and distribute the contribution as part of a revision or of a later collective work in the same series.

The bill would give contributions to compilations, supplementary works, instructional texts and audiovisual works other than motion pictures a new statutory presumption, similar to that in § 201(c), that, absent other agreements or transfers, the owner of copyright in the larger work acquires only the right to reproduce and distribute works as part of the larger work and any revisions of it.

Further, the bill would require that a transfer of an author's work in one of the categories in § 201(c) "not exceed the rights which the transferee reasonably anticipates exercising."

The Copyright Office's believes that this proposal is inequitable to publishers who assume the substantial financial risks of publishing and marketing copyrighted works. While it applies only to limited categories of works, and its intent to prevent unconscionable contracts is admirable, it is perhaps better left to the marketplace to negotiate publishing contracts.

Ownership of the Physical Work of Art

The bill would amend § 202 of the Act to state that, in a work for hire agreement, property rights in any material object would not pass to the employer or commissioning party in the absence of a written agreement expressly conveying these rights.

Section 202 now reflects the traditional copyright law presumption that the author—including the employer in the case of works made for hire—owns distinct property rights both in the physical property and the literary or artistic property. This is a fundamental principle of the Copyright Act.

If the bill's amendment were adopted the "author" of works made for hire (i.e. the employer or commissioning party) would be required to obtain ownership of both the physical work and the copyright in order to exploit the work. Otherwise, he or she might be held to common law bailee duties with respect to the physical object. The amendment would also blur the § 202 distinction between physical and intellectual property, leaving unclear what rights of use are enjoyed by the owner of the physical property of a copyrighted work.

Termination of Transfers and Licenses Granted by the Author

Finally, the bill would amend § 203(a)(3) of the Act, for works in § 201(c), to allow partial termination during a five year period after three years from the date of execution of the grant. The termination would apply to any usage permitted under the grant, not exercised by publication, except that a title published within the three year period could be republished in an original or revised version of the particular title. Neither the effectuation nor the failure to effect a partial termination would restrict the author's right to a complete termination under § 203.

The Office believes that the clearance and reprint right procedures for publishers, who commonly utilize "work for hire" agreements, would be vastly complicated and business practices would have to be drastically altered. Even more problematical is the practical nullification of all-rights publishing contracts by the three-year exercise proviso. If a publisher, for example, published a work but failed to sell foreign rights within three years, the author could terminate that portion of the grant not exercised by publication and grant foreign rights to another publisher; the original publisher would lose the benefit of the bargain for which it had paid. This could result in a major change in existing business practices where the publisher usually acts as a clearinghouse for subsidiary rights, often on behalf of the author. By creating added problems of clearance, it would adversely affect educators and other users. Finally, the Copyright Office suspects it might ultimately prove to be an unintended detriment to authors, for publishers would undoubtedly pay less for purported all-rights contracts knowing that some rights might be terminated. Moreover, publishers would have little incentive to assume the financial liability of promoting the sales of subsidiary rights given the risk that publisher benefits from such sales might be lost if negotiations were not successful within the relevant time frame.

Conclusion

Because the bill would alter the author-employer balance that Congress struck after much legislative debate in the 1976 Copyright Act, the Copyright Office would not support it at this time. Even without legislative change, the courts now have the power to accomplish many of the objectives of S. 2330. I would urge that they be given a few more years of experience under the new law to work out the glitches and eradicate any lingering injustice.

The Office continues to be concerned about reported abuses of the present law's for-hire provisions, but S. 2330 would severely interfere with private employment contracts and would place publishers and other exploiters of copyrighted works under severe constraints in marketing their works. In addition, users who traditionally seek reprint permission from publishers would be faced with the all but insurmountable task of tracking down individual authors for permission or risking copyright infringement. These drawbacks for all authors outweigh the sympathies felt for individual authors who lack the bargaining power to resist isolated unfair publisher practices.

On the other hand, the proposal to clarify the point in time when a work for hire must be signed is useful in principle. The Office would be pleased to continue to work with your staff in developing an appropriate text.

Yours truly,

/s/ Ralph Oman
RALPH OMAN
Register of Copyrights

Supreme Court, U.S.
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No. 88-293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Petitioners,

v.

JAMES EARL REID,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICUS CURIAE INTELLECTUAL PROPERTY OWNERS, INC. IN SUPPORT OF PETITIONERS

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IN THE

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OCTOBER TERM, 1988

No. 88-293

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Petitioners,

v.

JAMES EARL REID,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF AMICUS CURIAE INTELLECTUAL PROPERTY OWNERS, INC. IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Intellectual Property Owners, Inc. (IPO) is a non-profit association incorporated in the District of Columbia. IPO's members own patents, copyrights, trademarks, trade secrets, and similar legal rights. IPO's members include U.S.-based manufacturers responsible for a significant portion of the research and development performed in the United States.

In order to recoup their investments in technological and creative works, IPO's members need laws that provide effective protection of intellectual property rights.[1] Protection for intellectual property is of major importance to the U.S. economy. Royalties and fees received by U.S. industry from international licensing transactions, for example, are $8.2 billion a year, which is more than six times the amount U.S. industry is paying to foreign firms in royalties and fees.[2]

Piracy and counterfeiting of intellectual property by domestic and foreign competitors is a major problem for innovative U.S. companies. U.S. firms may be losing as much as $43 to $61 billion a year because of inadequate protection of American intellectual property in foreign markets.[3] Losses by legitimate intellectual property owners to piratical copiers in the U.S. market also are substantial.[4] Industry groups that rely heavily on copyright law for protection from imitators include, among others, the computer and software industry, the entertainment industry, and the publishing industry.[5]

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[1] *See generally* Report of the President's Commission on Industrial Competitiveness, *Global Competition: The New Reality*, vol. II, at 306-51 (1985).

[2] U.S. Department of Commerce, *Survey of Current Business*, Table 10, Mar. 1988.

[3] U.S. International Trade Commission, Pub. No. 2065, *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, App. H. (1988).

[4] Congress has enacted several laws recently designed to strengthen intellectual property protection in the United States. E.g., Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 1301 *et seq.*, 1341-42, 9001-07, and 9101; Trademark Law Revision Act of 1988, Pub. L. No. 100-667; Amendments to Bankruptcy Code, Pub. L. No. 100-506.

[5] *See* U.S. International Trade Commission, cited *supra* note 3, at 4-2 and 4-3.

The purpose of copyright law is to encourage creativity by providing protection against competitors who seek to take unfair advantage of the time, expense, effort and imagination of creators. Copyright law should provide incentives to independent creators and incentives to hiring parties who pay for creation of works.

It is to the advantage of an employer or other hiring party to have a work treated as a "work made for hire" under §§ 101 and 201(b) of the Copyright Act of 1976.[6] Although a hiring party may negotiate a contract requiring the hired party to transfer copyright ownership as a condition for creating the work, the hiring party can be left in an unfair position when the need for a contract is not understood or the contract is improperly drawn. In addition, works made for hire are exempt from § 203 of the Act, which allows an author to shorten the duration of copyright protection available to the hiring party by terminating a transfer of ownership or a license after 35 years.[7]

IPO respectfully urges that the court below misinterpreted the intent of Congress with respect to the provisions of the 1976 Copyright Act governing works made for hire, to the detriment of hiring parties.

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[6] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. § 101 *et seq.*).

[7] Transfers of ownership and licenses may be terminated by an author notwithstanding an agreement to the contrary. 17 U.S.C. 203(a)(5). Copyright in works made for hire also differs from regular copyright in other ways. 1 M. Nimmer and D. Nimmer, Nimmer on Copyright, § 5.03[A] (1988).

SUMMARY OF ARGUMENT

The court below erred in adopting the "literal" interpretation of the work for hire provisions of the 1976 Copyright Act. Congress did not intend to change the 1909 Act to limit "employees" for purposes of the work for hire doctrine to those who qualify as employees under agency law. The House and Senate Committee reports suggest Congress did not intend to revise the work for hire doctrine radically.

The court below overlooked significant problems with the literal approach. Under the literal approach, when a hiring party lacks a contract requiring transfer of copyright ownership, the party is plunged into a morass of accounting to co-authors under rules governing joint authorship. The literal approach would cause an increase in litigation among joint authors. Even with a contract, an employer is left with a shorter term of copyright protection under the literal interpretation.

By discouraging hiring parties from engaging freelance creators, the literal interpretation would discourage investments in creative works. This would weaken the nation's industrial competitiveness.

By following the "control and supervision" interpretation of the Second and Seventh Circuits, the two paragraphs of § 101 of the 1976 Act can be reconciled without radically limiting the work for hire doctrine. The control and supervision interpretation reflects the intent of Congress and preserves incentives for investing in creative works.

ARGUMENT

I. The Court Below Misinterpreted the Works Made for Hire Provisions of the 1976 Copyright Act.

The court below concluded that the respondent, sculptor James Earl Reid, was not an "employee" of the petitioners, Community for Creative Non-Violence et al. (CCNV), for purposes of §§ 101 and 201(b) of the 1976 Copyright Act.

No one questions that CCNV would have been an "employer," and Reid an employee, under the work for hire provision in § 26 of the Copyright Act of 1909.[8] Even the opinion of the Fifth Circuit in *Easter Seals Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*,[9] the principal precedent relied upon by the court below, concluded that under the 1909 Act "whenever one person bought authorship services from another, the seller was a copyright 'employee' and the buyer was a statutory 'author'." [10] Section 26 of the 1909 Act read as follows: ". . . the word 'author' shall include an employer in the case of works made for hire."

The court below considered three main interpretations of the work for hire provisions of §§ 101 and 201(b) of the Copyright Act of 1976: the "literal" interpretation, the "conservative" interpretation,[11] and the "control and supervision" interpretation applied by the Second and

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[8] Copyright Act of 1909, Pub. L. No. 1075, 60 Stat. 1075.

[9] 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1280 (1988).

[10] *Id.* at 327.

[11] The Fifth Circuit noted (815 F.2d at 328 n.10) that the distinction it drew was similar to that proposed in O'Meara, *"Works Made For Hire" Under the Copyright Act of 1976—Two Interpretations*, 15 Creighton L. Rev. 523 (1982). O'Meara uses the term "radical" for the interpretation the Fifth Circuit designated "literal."

Seventh Circuits in *Aldon Accessories*[12] and *Evans Newton*.[13]

The court below opted for the literal interpretation. That interpretation uses agency law rules to determine the meaning of "employee" in § 101(1), and assumes § 101(2) covers only independent contractors who are not agency law employees under § 101(1). It sharply narrows the meaning given to "employer" and "employee" in cases decided under the 1909 Act.

We submit that the literal interpretation has no basis in the legislative history of the 1976 Act. Without evidence that Congress intended to change the meaning of the term "employer", the literal interpretation is not supportable. The House and Senate Committee reports[14] and the House-Senate conference report[15] contain no suggestion that Congress intended to revise the work for hire doctrine radically or that a change was being made in the definition of "employer".

The Fifth Circuit acknowledged difficulty in squaring the literal interpretation with § 201(b), which contains a broad reference to "the employer or other person for whom the work was prepared."[16] The committee reports

[12] *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir. 1984), *cert. denied*, 469 U.S. 982 (1984).

[13] *Evans Newton, Inc. v. Chicago Systems Software*, 793 F.2d 889 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 434 (1986).

[14] H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976), S. Rep. No. 473, 94th Cong., 1st Sess. (1975).

[15] H.R. Conf. Rep. No. 1733, 94th Cong., 2d Sess. (1976).

[16] § 201(b) reads as follows: "*Work made for Hire*—in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."

on the 1976 Act open the explanation of works for hire by stating:

> Section 201(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the *employer* is considered the author of the work and is regarded as the initial owner of copyright unless there has been an agreement otherwise (emphasis added).[17]

The committee reports barely mention works for hire in connection with § 203, even though works for hire were being exempt from § 203. If Congress intended major changes in the work for hire doctrine, surely it would have explained the changes when explaining the ramifications of § 203.

The court below believed works made by "regular or formal" employees are works made for hire without regard to the employer's exercise of control.[18] This is consistent with the literalist assumption that Congress in 1976 intended to wipe out judicial interpretations of scope of employment under the 1909 Act and start afresh. However, the court below overlooks significant problems with the literal approach. For example, under the 1909 Act courts recognized an exception to the work for hire doctrine for teachers and professors employed by academic institutions.[19] The Seventh Circuit observed in a recent opinion, "To a literalist of statutory interpretation, the conclusion that the Act abolished the exception may seem inescapable".[20] Surely Congress did not intend *sub silentio* to wipe out this aspect of case law under the 1909 Act.

[17] H.R. Rep. No. 1476, cited *supra* note 14, at 121; and S. Rep. No. 473, cited *supra* note 14, at 104.

[18] *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1490 n.6 (D.C. Cir. 1988).

[19] *Hays v. Sony Corp.*, 847 F.2d 412, 416 (7th Cir. 1988).

[20] *Id.* at 416.

We submit that the court below erred in relying on sources that are not persuasive—or even relevant—as to the intent of Congress. The court below was "particularly impressed by scholarly commentary on the legislative history of the 1976 Act . . . ."[21] Those commentators relied on recommendations made in reports written during the 1960's by the Register of Copyrights and private individuals and organizations. This "legislative history", however, supports the *Aldon Accessories* view that the relevant consideration is whether the hiring party had creative control.[22] In any event, legislation should be interpreted by relying on evidence of the understanding and intent of the legislators who voted on and approved the legislation.[23]

II. The Interpretation by the Court Below Weakens Incentives for Investing in Creative Works and Thereby Weakens the Nation's Industrial Competitiveness.

When a hiring party fails to obtain a contract requiring transfer of copyright ownership, the difficulty for the hiring party under the literal interpretation is illustrated by the opinion below. The court remanded the case for further proceedings to determine whether the statue is a *joint work* of CCNV and Reid.[24] In the absence of an agreement specifying otherwise, profits earned from a joint work are to be divided equally, even where it is clear that the contributions to the joint work are not equal.[25] One can qualify as a joint author with no more than a minimal contribution.[26]

[21] 846 F.2d at 1492.

[22] *See* Petition for Writ of Certiorari at 15-18, *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988) (No. 88-293), *cert. granted*.

[23] *See* N.J. Singer and C.D. Sands, Sutherland on Statutory Construction § 48.12 (4th ed. 1984).

[24] 846 F.2d at 1499.

[25] 846 F.2d at 1498, citing 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 6.08 at 6-20 (1988).

[26] 846 F.2d at 1495.

The literal interpretation undoubtedly would cause an increase in litigation among joint authors. Reid was assisted at various times by a dozen different people, all paid by him. It may be that the dozen employees of Reid and unnamed parties who created the steam grate, base and special-effects equipment on which the statue rested *all* would be joint authors with Reid and CCNV under the mistaken interpretation of the law adopted by the court below.

Even if an employer has a contract requiring transfer of copyright as a condition for paying for the creation of the work, the employer will have a shorter term of protection if the work is not "for hire". And when the author terminates transfer of copyright under § 203, the employer not only will lose exclusive rights in the work it paid to create, but may be blocked from using the work.

Under the literal interpretation, employers would be able to obtain complete copyright rights only when they utilized in-house or other kinds of traditional employment arrangements. Better results sometimes can be obtained by hiring free-lance creators. By discouraging hiring parties from engaging free-lance creators, the literal interpretation will discourage investments in creative works. This will weaken the nation's industrial competitiveness.

III. The Control and Supervision Test Adopted by the Second and Seventh Circuits Reflects the Intent of Congress and Preserves Incentives for Investing in Creative Works.

The control and supervision test adopted by the Second Circuit in *Aldon Accessories* and followed by the Seventh Circuit in *Evans Newton* is consistent with §§ 101 and 201(b) of the 1976 Act and the legislative history.

The House and Senate committee reports describe the work for hire provisions as a compromise,[27] but no more Congressional intent can be discerned which is relevant to the meaning of paragraph (1) of § 101. However, only with the control and supervision interpretation can paragraphs (1) and (2) of § 101 be reconciled without radically limiting the work for hire doctrine.[28]

Paragraph (1) makes the work a work for hire whenever it is made by an employee hired specifically to create copyrightable material, making the employee's work subject to the employer's control and supervision. Under paragraph (1), the presence or absence of a work for hire is governed by the relationship between the parties.

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[27] H.R. Rep. No. 1476, cited *supra* note 14, at 121; and S. Rep. No. 473, cited *supra* note 14, at 104.

[28] The work made for hire definition in § 101 of the 1976 Act is as follows:

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of this foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revision, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Paragraph (2) extends the work for hire doctrine beyond paragraph (1) for nine specific types of specially ordered or commissioned works. For the nine types of works, the parties can determine work for hire status by written agreement, whether or not control and supervision is present. The nine categories of works in paragraph (2) are ones for which Congress decided commissioning parties needed the ability to bargain for authorship rights irrespective of control and supervision.

The court below followed the reasoning of the Fifth Circuit in *Easter Seals Society*, which asserted four problems with the control and supervision rule. Our rebuttal to each is set forth below.

> (1) [T]he rule is unnecessary in cases where "work for hire" is raised by the defendant to question the validity of the plaintiff's copyright since any plaintiff who actually controls an independent contractor will be a co-author of the work;[29]

Rebuttal: A plaintiff who controls an independent contractor is not kept whole by being treated as a co-author of the work. A co-author lacks exclusive rights and owes an accounting to the other authors.

> (2) [I]t makes the outcome of "work for hire" analysis too fact-specific and therefore less predictable by buyers and sellers;[30]

Rebuttal: It is the "literal" interpretation followed by the court below that makes the outcome fact-specific and unpredictable; it plunges employers into the morass of accounting to co-authors. Any predictability achieved by the literal interpretation is at the expense of the rights of employers in works paid for and controlled by employers.

---

[29] 815 F.2d at 334.

[30] *Id.*

(3) [I]t does not eliminate the need for a determination of employee versus independent contractor since the "actual control" test applies only to independent contractors; [31]

Rebuttal: The "literal" approach does not eliminate the need for determination of employees versus independent contractor either, and the literal approach leaves the courts with less flexibility to deal with special situations such as employed educators.[32]

(4) [I]t slides too easily into the vague and expansive "right to control" test, as . . . *Evans Newton* may portend.[33]

Rebuttal: There is no reason to believe courts will slide into a different test. The *Evans Newton* opinion reveals significant control by the hiring party over the computer programer who performed programming work and prepared documentation.[34]

The Second and Seventh Circuit interpretation adopted in *Aldon Accessories* and *Evans Newton* yields the result parties are likely to have intended. When a party pays for, controls, and supervises the creation of a work, the party will assume it owns all rights in the work in the absence of an agreement providing otherwise.

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[31] *Id.*

[32] *See supra* text accompanying note 19.

[33] *Id.*

[34] 793 F.2d at 891-2. Specialized terms and concepts that had been developed by the hiring party were incorporated into the project. The hiring party set up a schedule for the employee to begin working and required a demonstration of the final version of the program. *Evans Newton* illustrates the need for a practical work for hire doctrine. The hiring party's attempted written agreement for transfer of copyright apparently failed to protect against copying of the user's manual.

CONCLUSION

Intellectual Property Owners, Inc. urges the Court to reverse the ruling of the Court of Appeals for the District of Columbia Circuit that the work for hire doctrine is inapplicable to the dispute between CCNV and Reid.

Respectfully submitted,

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COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,

Petitioners,

—v.—

JAMES EARL REID,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION AND THE INFORMATION INDUSTRY ASSOCIATION, *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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IN THE

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No. 88-293

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,

Petitioners,

—v.—

JAMES EARL REID,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION AND THE INFORMATION INDUSTRY ASSOCIATION, *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

The Computer and Business Equipment Manufacturers Association and the Information Industry Association submit this brief as *amici curiae* in support of petitioners. The parties to this action have given their written consent to the filing of this brief pursuant to Rule 36 of the Rules of this Court. Copies of the letters of consent have been filed with the clerk.

INTEREST OF THE *AMICI*

The Computer and Business Equipment Manufacturers Association ("CBEMA") is a trade association of 33 companies on the leading edge of high technology in the computer, business equipment and telecommunications industries in the United States. Each year, CBEMA companies invest billions of dollars in the creation and distribution of thousands of copyrighted computer programs, as well as many other copyrighted works, including books, manuals and research journals, and instructional, promotional and advertising materials in print, videotape and other forms.

The Information Industry Association ("IIA") is a trade association representing over 700 companies that pursue the business opportunities associated with the creation, dissemination and use of information products and services online and in machine-readable and printed copies. IIA companies make substantial investment in the creation and dissemination of a wide range of copyrighted information, including news and legal research materials; scholarly and academic studies; economic, financial and business data; and many other valuable forms of information.[1]

In creating many thousands of copyrighted works each year, it is common for CBEMA and IIA members to hire and use the work of independent contractors as well as their own salaried employees. In addition, members of *amici* acquire from third parties the rights in many copyrighted works that independent contractors produce for the third parties as works for hire. Independent contractors are frequently hired, for example, to prepare screen displays for members' computer programs, or text or graphics for their instruction manuals or other documentation; to select, coordinate and arrange data for their data bases; to create photographs or artwork for their promotional or advertising materials; to prepare television commercials or portions of them; and to design the packaging for the products.

1 Lists of CBEMA's members and IIA's members are included in Appendix A, *infra*.

If such works created in whole or in part by independent contractors are denied treatment as works made for hire, and instead are treated as joint works, the resulting fragmentation of ownership and control of copyrights would be a strong disincentive to the members of *amici* to make the investment necessary for the creation and dissemination of the works. Indeed, a likely result is that independent contractors would be retained less frequently and would have fewer opportunities for remuneration in creating such works. Fragmentation would be compounded exponentially when successive new versions, editions and other "derivative works" are prepared, especially if a variety of independent contractors are used. The requirements for coordinating the ownership and control of the successive contributions probably could not be surmounted sufficiently to facilitate the necessary exploitation of the rights in such works on an exclusive basis.

Although companies large and small must retain outsiders for significant portions of their creative work, the smaller the member company of *amici* the greater is its need to hire independent contractors to contribute their creativity to the company's authorship of its works. Thus, the disincentive that the Court of Appeals' approach in this case would impose for the investment in creating and disseminating copyrighted works would be even more of a burden on smaller companies than on the larger companies.

SUMMARY OF ARGUMENT

Under the 1976 Copyright Act, in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author. 17 U.S.C. 201(b). A "work made for hire" is defined in 17 U.S.C. 101 and includes, under part (1) of the definition, "a work prepared by an employee within the scope of his or her employment" and, under part (2), "a work specially ordered or commissioned" under certain circumstances. The terms "employee" and "employment" are not defined in the 1976 Act or in its legislative history.

Nothing in the 1976 Act or its legislative history indicates that Congress intended that a copyrightable work of an independent contractor could not, under any circumstances, qualify as a work for hire under part (1) of the definition concerning "employment." *Amici* submit that the proper interpretation of "employee" includes "independent contractor" whenever the hiring party, in the exercise of its control over the contractor, satisfies the copyright law's traditional test of "authorship" by contributing originality and at least a modicum of intellectual labor.

Under the 1909 Copyright Act, which the 1976 Act replaced, an employer in the case of a work made for hire was also considered an author. The terms "work made for hire" and "employee" were not defined. A significant and well-established body of case law under the 1909 Act treated an independent contractor as an employee, and the hiring party as an employer, under certain circumstances. Nothing in the 1976 Act or its legislative history, however, even refers to this prior case law, let alone reflects any congressional intent to dispense with it in those circumstances where the hiring party's contribution is at least sufficient to meet the test of authorship under the copyright laws. It is not conceivable that such a fundamental, indeed radical, change in existing law—had such a change been intended—would have gone unremarked in the legislative history of the 1976 Act.

If the scope of "employee" is given the narrow interpretation advocated by respondent, thus excluding all works by independent contractors from part (1) of the work for hire definition in the 1976 Act, there will be serious adverse consequences clearly not intended by Congress.

No one disputes that a narrow interpretation of the scope of the work for hire provisions will encourage a corresponding increase in claims of co-authorship in works denied work for hire treatment. Co-owners of a copyright under the 1976 Act are considered tenants in common, as they were under the 1909 Act, with each co-owner having an independent right to use or license the use of a work without the consent of the other co-

owners (subject only to a duty of accounting to the other co-owners for any profits). However, effective exploitation by a licensee is possible only if the licensee has been granted *exclusive* rights, which a single co-owner cannot grant. Since a co-owner can grant only *nonexclusive* rights, a licensee would need the consent of each and every one of the co-owners in order to acquire an exclusive license.

Multiple authorship is thus likely to result in the fragmentation of ownership and control of copyrights, increased difficulty and cost in acquiring exclusive rights, and ever-increasing interference with the dissemination of creative works, a principal purpose of the copyright system.[2]

ARGUMENT

I.

NOTHING IN THE 1976 COPYRIGHT ACT OR ITS LEGISLATIVE HISTORY SUGGESTS THAT AN INDEPENDENT CONTRACTOR CAN NEVER BE AN "EMPLOYEE" UNDER PART (1) OF THE ACT'S DEFINITION OF "WORK MADE FOR HIRE"

Congress did not intend that an independent contractor could never be an "employee" under part (1) of the "work made for hire" provision of the Copyright Act of 1976 ("1976 Act"), 17 U.S.C. 101 *et seq*. This conclusion follows from examination of the 1976 Act and its legislative history, as well as the predecessor law, the Copyright Act of 1909 ("1909 Act"), 17 U.S.C. 1 *et seq*. (repealed), and the cases interpreting it.

A conflicting interpretation of the 1976 Act's work for hire provision was offered in *Easter Seal Society for Crippled Children* v. *Playboy Enterprises*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 1280 (1988) ("Easter Seal"), and was fol-

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2 "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., art. I, § 8, cl. 8.

lowed in this case, *Community for Creative Non-Violence* v. *Reid*, 846 F.2d 1485 (D.C. Cir. 1988) (Pet. App. 1a-28a),[3] *cert. granted*, 57 U.S.L.W 3333 (U.S. Nov. 7, 1988) (No. 88-293) ("CCNV"). The courts in *Easter Seal* and *CCNV* found that an independent contractor cannot be regarded as an "employee" under part (1) and, therefore, that the work of an independent contractor can be placed in the "work made for hire" category only when the work falls under part (2) of the definition. More specifically, those courts held that unless a creator is an "employee" within the rules of agency law (see Restatement (Second) of Agency § 220 (1958)), a work cannot be considered a "work made for hire" under the 1976 Act unless that work has been specially ordered or commissioned, falls within one of the nine specific categories enumerated in part (2), and the parties expressly agree in a writing signed by them that the work shall be considered a work made for hire.

At least two other courts of appeals disagree and have held that under certain circumstances an independent contractor can be considered an "employee" under part (1) of the 1976 Act's work for hire definition. *Aldon Accessories Ltd.* v. *Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984) ("Aldon") ("work made for hire" found where independent contractor was "actually sufficiently supervised and directed by the hiring party" to be considered an "employee," because "Congress intended the prior law in such situations to remain unchanged"); *Evans Newton Inc.* v. *Chicago Systems Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986) ("Evans"); *see Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987).

Amici submit that the decisions in *CCNV* and *Easter Seal* incorrectly interpret the 1976 Act and its legislative history and are contrary to sound copyright policy.

3 "Pet. App." refers to the appendix to the petition for a writ of certiorari.

A. The 1976 Copyright Act "Work Made For Hire" Provisions

The 1976 Act states that copyright ownership "vests initially in the author or authors of the work" and that the "authors of a joint work are coowners of copyright in the work." 17 U.S.C. 201(a). In the case of a "work made for hire," the 1976 Act provides that "the employer or other person for whom the work was prepared is considered the author for purposes of" the Act "and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." 17 U.S.C. 201(b).

A "work made for hire" is defined in the 1976 Act, 17 U.S.C. 101, as

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. . . .

The terms "employee" and "employment," used in part (1) of the work for hire definition, are not themselves defined in the 1976 Act or in its legislative history.[4]

B. The 1909 Copyright Act "Work Made For Hire" Provisions

Similarly, in the 1909 Copyright Act, which the 1976 Act replaced, the term "author" included "an employer in the case of works made for hire." 17 U.S.C. 26 (repealed). The terms

4 The work for hire provision is significant in several contexts of the 1976 Act: for example, such works are not subject to the provisions under which authors or their statutory heirs may terminate certain transfers and licenses, 17 U.S.C. 203 and 304(c); 17 U.S.C. 304(a) (renewals of copyright); 17 U.S.C. 302(c) (duration of copyright).

"works made for hire" and "employer" (or "employee") were not defined, however, in the 1909 Act or in its legislative history.[5] It remained for case law to define the scope of these terms.

C. Case Law Under The 1909 Copyright Act Applied Its "Work Made For Hire" Provisions To "Independent Contractors" As Well As "Employees"

Under the 1909 Act, the "work made for hire" doctrine was applicable whenever the creator's work was produced at the instance and expense of the hiring party or, in other words, when the hiring party was the motivating factor in inducing creation of the work. It was sufficient that the hiring party had the right (whether or not the right was actually exercised) to direct and supervise the creator's work.

It was firmly established, moreover, that the work for hire principle applied to "independent contractors" as well as to "employees." Put differently, under the 1909 Act, independent contractors could be statutory "employees." *Brattleboro Publishing Co.* v. *Winmill Publishing Corp.*, 369 F.2d 565, 568 (2d Cir. 1966) ("We see no sound reason why these same [work for hire] principles are not applicable when the parties bear the relationship of employer and independent contractor."); *Picture Music, Inc.* v. *Bourne, Inc.*, 457 F.2d 1213, 1216, 1217 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972) ("That she acted in the capacity of an independent contractor does not preclude a finding that the song was done for hire. . . ."; the "absence of a fixed salary" and "the freedom to do other work" are "never conclusive" in an "independent contractor situation"; "[t]he purpose of the statute is not to be frustrated by conceptualistic formulations of the employment relationship."); *Murray* v. *Gelderman*, 566 F.2d 1307, 1310-11 (5th Cir. 1978) ("[T]he nature of the employment relationship is not dispositive; for example, the works for hire doctrine is applicable when the parties are employer and independent contractor." *Id.* at 1311, n.7.)[6]

5 *See, e.g.*, 17 U.S.C. 24 (repealed), the provision dealing, among other things, with renewal of copyright in works made for hire.

As one commentator has put it, "under the old act, the distinction between an 'employee' and an 'independent contractor' was a distinction without a difference." O'Meara, "*Works Made For Hire" Under the Copyright Act of 1976—Two Interpretations*, 15 Creighton L. Rev. 523, 524 (1982) ("O'Meara").

D. Neither The 1976 Act Nor Its Legislative History Suggests That Congress Intended To Abolish The 1909 Act Case Law Treating "Independent Contractors" As Copyright "Employees"

Because the terms "employee" and "employment" are not defined or explained, the language of part (1) of the 1976 Act's work for hire definition is, concededly, "equivocal." *Easter Seal*, 815 F.2d at 328. But nothing in the House or Senate reports which accompanied the proposed 1976 Act (or elsewhere) rejects the substantial body of law under the 1909 Act which included independent contractors as employees. Nor does the legislative history reveal any congressional intent that an "independent contractor" could never be an "employee" under part (1) of the new law's work for hire definition. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5659, 5736-37 ("House

6 *See also Yardley* v. *Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940); *Lin-Brook Builders Hardware* v. *Gertler*, 352 F.2d 298, 300 (9th Cir. 1965); *Scherr* v. *Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970) ("The essential factor . . . is whether the employer possessed the right to direct and to supervise the manner in which the work was being performed."); *Siegel* v. *National Periodical Publications, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974); *Epoch Producing Corp.* v. *Killiam Shows, Inc.*, 522 F.2d 737, 744 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976); *Real Estate Data Inc.* v. *Sidwell Co.*, 809 F.2d 366, 371 (7th Cir. 1987) ("The [1909 Act's work made for hire] rule applies to independent contractors, as well as employees."); *Easter Seal*, 815 F.2d at 327 ("[A]t time of the adoption of the 1976 Act, [there was] an almost irrebutable presumption that any person who paid another to create a copyrightable work was the statutory 'author' under the 'work for hire' doctrine").

Report") and S. Rep No. 473, 94th Cong., 1st Sess. 104-105 (1975) ("Senate Report"); H.R. Rep. No. 1733, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S. Code. Cong. & Ad. News 5810 ("Conference Report").

The *Easter Seal* court acknowledged that its interpretation of the 1976 Act, excluding "independent contractors" from "employees," was a "radical break" from the work for hire doctrine under the 1909 Act. 815 F.2d at 335, 330. *Amici* submit that it is not conceivable that such a fundamental, sweeping revision of existing law, had it been intended, would have gone unremarked or unnoticed in the extensive legislative history accompanying the 1976 Act. *Aldon*, 738 F.2d at 552; *Easter Seal*, 815 F.2d at 331. Nowhere do the House and Senate Reports, for example, even refer to, let alone criticize, the *Brattleboro*, *Picture Music* and other federal appellate court decisions on work for hire, cases which formed part of an important and noteworthy body of law that could not have escaped attention and comment.

In other instances where Congress did intend to revise or supplant existing case law, that intent was expressly disclosed. *See, e.g.*, House Report at 52 ("This broad language [concerning statutory copyrightability] is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908) . . . ."); at 64 ("One of the principal purposes of the definition was to make clear that, contrary to the decision in *Metro-Goldwyn-Mayer Distributing Corp.* v. *Wyatt*, 21 C.O. Bull. 203 (D. Md. 1932), performances in 'semipublic' places . . . are 'public performances' subject to copyright control."); and at 124 ("[T]he bill would change a common law doctrine exemplified by the decision in *Pushman* v. *New York Graphic Society, Inc.*, 287 N.Y. 302 . . . (1942)."). *See* Register of Copyrights, 87th Cong., 1st Sess., Copyright Law Revision: Report on the General Revision of the U.S. Copyright Law 89-90 (House Comm. Print 1961) ("Register's Report") (recommending test of what constitutes work of joint authorship that would depart from two decisions of the Second Circuit).

To the contrary, there are indications that Congress did not intend to alter the 1909 Act concerning part (1) "employees." House Report at 121 ("Section 201(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright. . . . The presumption that initial ownership rights vest in the employer for hire is well established in American copyright law. . . ."); Senate Report at 104; *Aldon*, 738 F.2d at 552; *Easter Seal*, 815 F.2d at 330-331; O'Meara at 526, 527-528, 533-534.

E. Nothing In Part (2) Of The 1976 Act's "Work Made For Hire" Definition Precludes An Interpretation Of Part (1) Whereby "Employees" Can Include Certain Independent Contractors

There is nothing in the language or legislative history of part (2) of the 1976 Act's work for hire definition which prevents an interpretation of part (1) that would permit an independent contractor to be considered an "employee" under certain circumstances. Contrary to *Easter Seal*, 815 F.2d at 329, the two-part definition of "work made for hire" does not reflect a "simple dichotomy" between "employees" (part (1)) and "independent contractors" (part (2)), with the two classes being mutually exclusive.

In fact, part (2) does not mention the term "independent contractor." Moreover, part (2) surely includes an "employee" where, for example, the employee, acting outside the scope of his or her employment,[7] is commissioned to prepare a work of the type covered by part (2).

Part (1) focuses solely on the nature of the relationship—"employment"—between the parties and their status as

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7 The phrase "within the scope of his or her employment" was intended to make it clear that works created by employees on their own initiative outside of their employment, are not included in part (1). *See* Varmer, 86th Cong., 2d Sess., Copyright Law Revision: Study No. 13, *Works Made for Hire and on Commission* (1958) 123, 141 (Comm. Print 1960) ("Varmer Study").

"employer" and "employee," albeit none of these terms is defined; no agreement between the parties is required, and any type of work is covered. Part (2) focuses, instead, on the nature of the work—it must be both "specially ordered or commissioned" and fall within one of the nine specified categories of works; and further, there must be an express agreement signed by the parties stating that the work shall be considered a work made for hire. By "specially ordered or commissioned" the statute refers to a work prepared after the relationship between the parties began, that is, after the hiring party requested creation of the work. *See Siegel* v. *National Periodical Publications, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974) ("Superman" was completely developed before employment relationship started, so could not be work made for hire). Consequently, not all works by "independent contractors" are works "specially ordered or commissioned," or vice versa, despite what was said in *Easter Seal*, 815 F.2d at 329.

Parts (1) and (2) are thus different in their requirements and are not mutually exclusive. Part (2) reflects a "compromise" spelling out those specific categories of specially ordered or commissioned works (whether created by "employees" or "independent contractors") that can be considered "works made for hire" *under part (2)*, if the parties agree, and those that cannot be considered works for hire *under part (2)*, whether or not the parties agree. House Report at 121. Qualification for work made for hire status under part (2), however, does not preclude eligibility under part (1), where the test and pertinent factors are different. *Aldon*, 738 F.2d at 552 (independent contractors "actually sufficiently supervised and directed by the hiring party" are "employees" under part (1)).

Part (2) was a compromise between, on the one hand, draft legislation (supported by certain individual creators) that would have excluded from the work for hire provision all works made on special order or commission and, on the other hand, draft legislation (supported by book publishers and motion picture producers) that would have included all specially ordered or commissioned works if the parties expressly agreed in writing to consider them as works made for hire. Angel and Tannenbaum,

Works Made For Hire Under S. 22, 22 N.Y.L. Sch. L. Rev. 209, 230-232 (1976) ("Angel"); Hamilton, *Commissioned Works as Works Made For Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. Pa. L. Rev. 1281, 1291-1294 (1987) ("Hamilton"); O'Meara at 526; Penchina, *The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976*, 62 N.Y.U. L. Rev. 373, 381-386 (1987); Hardy, *Copyright Law's Concept of Employment—What Congress Really Intended*, 35 J. Copr. Soc. U.S.A. 210 (1988) ("Hardy"); *CCNV*, 846 F.2d at 1490, n.7 (Pet. App. at 9a, n.7).

But, at bottom, the compromise reflected in part (2) simply took account of the publishing and economic reality that certain kinds of specially ordered or commissioned works by their very nature should be eligible for work for hire status merely by agreement of the parties, without regard to the status or relationship of the parties (as employee or independent contractor) and without regard to the presence or the absence of direction and supervision, or the nature or extent of such control, by the hiring party. *Easter Seal*, 815 F.2d at 329, 331 ("The nine kinds of activities listed in § 101(2) . . . all involve situations where, in addition to owning the copyrights in the works by contract, it would be very useful for buyers to be able to become statutory 'authors.' " . . . "The activities in § 101(2) look like the kind of activities where the buyer normally wants and needs to be a statutory author in order to gain complete initial ownership of a collaborative project."); *Aldon*, 738 F.2d at 552.

Part (2) thus addressed a set of concerns different from that addressed by part (1). The two parts were intended to coexist, not compete or conflict. Eligibility under one part does not preempt eligibility under the other. For example, it cannot seriously be contended that a work for use as part of a motion picture (a part (2) category), specially requested by an employer from a full-time salaried employee working within the scope of his employment, is precluded from work for hire status under part (1) because the work is a type potentially subject to part (2).

By the same token, an independent contractor whose work is not eligible to be a work for hire under part (2) may nonetheless have his work treated as one for hire under part (1) if he qualifies as an "employee." The question, addressed in the next section, is under what circumstances an independent contractor may be considered an "employee" under part (1) of the work for hire definition.

II.

AN INDEPENDENT CONTRACTOR CAN BE AN "EMPLOYEE" UNDER PART (1) OF THE 1976 ACT'S DEFINITION OF "WORK MADE FOR HIRE" WHEN THE HIRING PARTY EXERCISES SUFFICIENT CONTROL OVER THE CONTRACTOR TO SATISFY THE TRADITIONAL TEST OF "AUTHORSHIP" UNDER THE COPYRIGHT LAW

Amici submit that the proper interpretation of "employee," as used in part (1) of the 1976 Act's "work made for hire" definition, should include "independent contractor" whenever the hiring party has exercised sufficient control over the contractor to satisfy the traditional test of "authorship" under the copyright law. This standard would be fulfilled when the hiring party contributes originality and at least a modicum of intellectual labor.

The Varmer Study (*supra* at 11 n.7), at 142, explained the principal basis for a possible distinction between works made by employees and works made by independent contractors:

> "Underlying this distinction is the premise that an employer generally gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor."

See Angel at 236 ("[T]he control and direction . . . that an employer often exerts over his employee" may "qualify" the employer "as a type of author deserving the benefits that flow

from designating a work as one made for hire."); Hamilton at 1289-1290.

Thus, when the hiring or commissioning party in fact exercises creative control, *i.e.*, supervision and direction, over an independent contractor, there is no sound reason to maintain any distinction between "employees" and "independent contractors" under the work for hire provisions. According to the Varmer Study, at 142, apart from the control factor "the policy considerations regarding the ownership of copyright in commissioned works are in many ways similar to those with respect to works made in the course of employment." As the study explained (*id.*):

> "Both classes of works are produced for, pursuant to the initiative and order of, and against payment by, a person other than the creator. The differences in type of payment or regularity of working hours between the employment and commission situations would not seem to be crucial reasons for different treatment."

See Aldon, 738 F.2d at 552 (noting criticism of those cases under the 1909 Act where the work for hire doctrine was "applied to all works prepared by an independent contractor, regardless of the presence or absence of direction and supervision by the hiring party" and finding that the 1976 Act was intended to alter the doctrine only in "those situations where the contractor did all of the creative work and the hiring party did little or nothing"); H.R. Rep. No. 83 (to accompany H.R. 2512), 90th Cong., 1st Sess. 86 (1967); Ringer, 86th Cong., 2d Sess., Copyright Law Revision: Study No. 31, *Renewal of Copyright* (1960) 105, 140 n.245 (Comm. Print 1961) ("Ringer Study").[8]

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8 Not only is it clear that "employee" should include an "independent contractor" where the hiring party exercises creative control, but there is no basis for inferring that Congress intended part (1) of the work for hire definition to be restricted to salaried employees only. Thus, for example, the suggestion of the Varmer Study (at 141) that the definition should "specify 'employment on a salary basis'" was not

(*Footnote continued on following page*)

The *Aldon* court did not specify the precise standard for determining when an independent contractor has been "sufficiently" supervised and directed by the hiring party to be considered an "employee." 738 F.2d at 552. *Amici* believe that the exercise of such creative control is sufficient when the hiring party's contribution satisfies the copyright law's traditional test of "authorship," that is, when the hiring party's contribution meets the more than *de minimis* threshold required for authorship. 1 M. Nimmer & D. Nimmer, Nimmer on Copyright §§ 1.06[A] and 1.08[C][1] (1988 ed.) ("Nimmer") ("the essence of authorship" is "originality," that is, independent effort, and "a modicum of intellectual labor"); House Report at 51-52; *Aldon*, 738 F.2d at 553 (hiring party "did much more than communicate a general concept or idea" to the independent contractors, that is, more than "leaving creation of the expression solely to them").

There is no reason, moreover, to require the hiring party to meet any different standard of authorship than that required of other creators. *See CCNV*, 846 F.2d at 1495-98 (Pet. App. 19a-26a) (one qualifies as joint author if his original contribution reflects more than a minimal amount of creativity, even if that contribution standing alone would not be copyrightable); Penchina, *The Creative Commissioner: Commissioned Works Under the Copyright Act of 1976*, 62 N.Y.U. L. Rev. 373 (1987).

The test proposed here will provide appropriate incentive to hiring parties whose creative control, initiative, expense and risk-bearing justify their being considered authors. At the same time, the test will not deprive an independent contractor of authorship status or copyright ownership for works conceived and prepared on his own initiative and economic risk. These

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(*Footnote continued from previous page*)

accepted by Congress, and the statute thus omits any reference to "salaried" employees. *Aldon*, 738 F.2d at 552 (no congressional intent to limit part (1) to "regular" or "formal" employees); *Evans*, 793 F.2d at 894; *CCNV*, 846 F.2d at 1490 n.6 (Pet. App. 9a, n.6); Ringer Study at 141 & nn.256, 257.

works (of any type) would not fall under either part (1) or part (2) of the work for hire definition because, among other reasons, there would be no control over the contractor and the works would not be specially ordered or commissioned. Moreover, the test would not interfere with the right of the parties under Section 201(b) of the 1976 Act, 17 U.S.C. 201(b), to agree that the employee is to own some or "all of the rights comprised in the copyright." 1 Nimmer § 1.06[C].

We do not believe that the *Aldon* test (or the test proposed by *amici*) is "too fact-specific for each work and therefore less predictable" by the parties. *Easter Seal*, 815 F.2d at 334. In any case, it is no more fact-specific or less predictable than the test adopted by the *CCNV* and *Easter Seal* courts, which depends on the host of factors, including actual control and right to control, to be considered under the Restatement (Second) of Agency § 220. Hardy at 256-257 (The "suggestion that the common law of agency will avoid work-by-work determinations seems misguided. . . . [T]he agency test of employment is, in short, no better in predictability than *Aldon*'s more circumscribed test of actual control.")

III.

EXCLUSION OF WORKS BY INDEPENDENT CONTRACTORS FROM PART (1) OF THE "WORK MADE FOR HIRE" DEFINITION WILL HAVE ADVERSE CONSEQUENCES FOR THE CREATION AND DISSEMINATION OF COPYRIGHTED WORKS

A determination that part (2) of the "work made for hire" definition is the exclusive provision governing works by independent contractors will unquestionably lead to the proliferation of joint authorship claims in those works which are denied work for hire treatment under part (1). *CCNV*, 846 F.2d at 1497 n.17 (Pet. App. 25a, n.17) ("With the substantial cutback of the work for hire doctrine under the 1976 Act, more cases of this genre can be expected to appear under the joint authorship

rubric." This was not previously the case "because [of] the broad scope of the work for hire doctrine under the 1909 Act.")

Moreover, these claims are likely to succeed "since any plaintiff who actually controls an independent contractor will be a co-author of the work." *Easter Seal*, 815 F.2d at 334, and 333, 336-337; *CCNV*, 846 F.2d at 1495-98 (Pet. App. 19a-26a) ("Reid, as sculptor, contributed more than a minimal amount of creativity to 'Third World America.' That is enough, once the work for hire doctrine is out of the picture, to render him an author of a protected work" under a joint authorship theory. *Id.* at 1495 (Pet. App. 21a)).

Co-owners of a copyright are considered tenants in common under the 1976 Act (as was so under the 1909 Act), with each co-owner thus having an independent right to use or license the use of a work without the consent of the other co-owners (subject only to the duty to account to the other co-owners for any profits). House Report at 121; *CCNV*, 846 F.2d at 1498 (Pet. App. 26a-27a).[9] A co-owner can grant only nonexclusive rights, however. Thus a licensee would need the consent of all of the co-owners in order to obtain an exclusive license. *Edward B. Marks Music Corp.* v. *Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir. 1944); *Donna* v. *Dodd, Mead & Co.*, 374 F.Supp. 429 (S.D.N.Y. 1974); 1 Nimmer §§ 6.10 n.3, 6.10[C] and 6.11.

The proliferation of joint authorship claims, in place of work for hire claims, would thus likely result in the fragmentation of ownership and control of copyrights and increased difficulty and cost in acquiring exclusive rights, which alone have any real economic value. *See* Ringer Study at 179 & n.561 ("This loss of exclusivity has been criticized as reducing the value of a copyright. . . ."). For example, in *CCNV*, such fragmentation because of co-authorship might well extend beyond the parties to the "others" engaged by CCNV and to the "dozen different people" who assisted Reid. *CCNV*, 846 F.2d 1497-98 (Pet.

9 Joint authors' "contributions need not be equal either quantitatively or qualitatively; though contribution of each must be more than *de minimis*, one may qualify as a joint author even if his contribution, 'standing alone would not be copyrightable.' " *CCNV*, 846 F.2d at 1496 (Pet. App. 23a) (citation omitted).

App. 26a).[10] Moreover, the preparation of successive new versions, editions and "derivative works," 17 U.S.C. 101, would substantially aggravate the problem.

That proliferation is likely, in turn, to provide an increasingly strong disincentive for the necessary investment in the creation of copyrighted works and their dissemination, which are two of the principal purposes of the copyright laws. *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."); O'Meara at 532-542 (describing specific problems of joint ownership and of excluding works by independent contractors from part (1) of the work for hire definition).

Computer programs and databases created by and for *amici* in today's technology are so complex and sophisticated that they are rarely created by a single individual; indeed, they are commonly created by dozens or even hundreds of people. The specter of joint authorship for such works would be a strong disincentive to their creation and dissemination in those circumstances where it is now customary to hire non-salaried independent contractors to contribute their creativity.

There is, of course, no hint anywhere in the 1976 Act or its legislative history that Congress ever intended such an expansion of the scope of joint authorship, or that Congress ever intended the adverse impact that constriction of the work for hire doctrine would have. Indeed, in the motion picture area, where either a co-ownership or work for hire arrangement might apply, Congress assumed that the work for hire status would prevail. House Report at 120-121.

Moreover, the term of copyright provided by Congress for joint works applies only where the joint work was "prepared by

10 Multiplying joint authorship claims in such a manner would also likely impose additional procedural burdens on courts and parties to copyright infringement actions in the important matters of joinder and intervention of parties. 17 U.S.C. 501(b); Fed. R. Civ. P. 19.

two or more authors who did not work for hire." 17 U.S.C. 302(b). Where an individual and a corporation are held to be co-authors—that is, where a joint work has been prepared by two or more authors, one or more of whom did work for hire—Congress specified no term of copyright, thus suggesting that it did not intend such situations to be common.

Amici submit that these harmful consequences would be avoided by the recognition that an "independent contractor" can be considered an "employee" under part (1) of the "work made for hire" definition, in the circumstances proposed in this brief.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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December 21, 1988

APPENDIX

APPENDIX

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Ameritech Communications, Inc.
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AMH Associates
Amidon/Litman Associates
Martha Amram

AMVOX, INC.
Anderson, Benjamin, Read & Haney, Inc.
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Applied Information Services Inc.
Applied Optical Media Corporation
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ASEC International, Inc.
Aspen Systems Corporation (Wolters Samson)
Associated Enterprises, Inc.
The Associated Press New Media Marketing Group
AT&T
AT&T Conversant Systems (AT&T)
Audio Information Sciences, Inc.
Audiotex Directory & Buyer's Guide
AutEx Systems Inc. (ITOL)
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Barron's Natl. Bus. & Fin. (Dow Jones)
Baruch Defense Marketing, Inc.
BASELINE II Inc (Baseline)
H.M. Bazoian Co.
Toni Carbo Bearman
Bear, Stearns International Corporation
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Beckerman Associates
Bedford Advisors, Inc.
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Bell Communications Research
Bell of Pennsylvania (Bell Atlantic)
BellSouth Advanced Networks (BellSouth)
BellSouth Advertising & Publishing
BellSouth Corporation
BellSouth Enterprises
BellSouth Information Systems
BellSouth International

BellSouth National Publishing
BellSouth Services
BellSouth Systems Technology
Bernan Associates
The Bernoulli Collection
L.M. Berry & Co. (BellSouth)
Berul Associates, Ltd.
THE BERWICK GROUP
Bidnet Inc. (D&B)
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CONSISDATA Ltda.
ConverSys, Inc.
Cooper Heller Research
Coopers & Lybrand
Coordinated Management Systems
Copyright Clearance Center, Inc.
Cordatum, Inc.
Corporate Management & Marketing Consultants, Inc.

Corporate Technology Information Services, Inc. (CorpTech)
COURTHOUSE TM Records, Inc.
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Richard J. Cowles Consulting
CoWorks
C & P Telephone Co. (Bell Atlantic)
CPAid, Inc. (ITOL)
The Credit Bureau, Inc. (Equifax)
Credit Bureau Marketing, Inc. (Equifax)
Cresap—a Towers Perrin company
CTL Communications Inc.

D&B Computing Services, Inc.
DAFSA
Damar Corporation (Praxis Group)
Dana Advertising
Data America Corporation
Data Courier (Bell & Howell)
Data Resources, Inc. (McGraw-Hill)
Data Retrieval Corporation
Data Quality
Database America
Database Development
Database Publishing Company
Database Services, Inc.
Dataline, Inc.
DATALINE DADOS INTERNATIONAIS LTDA.
Datalogics Inc.
Datapro Research Corporation (McGraw-Hill)
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DATAQUICK INFORMATION SYSTEMS
Data Stream (D&B)
DataTimes Corporation (Oklahoma Publishing)
DATEXT, INC. (Lotus)
Datis Corporation
Dealers' Digest, Inc. (United Newspapers)
Richard De Boo Publishers (ITOL)
Delmar Publishers Inc. (ITOL)
Derwent Inc. (International Thomson)

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Deucalion Venture Partners
DIALOG Information Services, Inc. (Lockheed)
Dialogic Corporation
Digital Information Group
Digital Sound Corporation
DirectoriesAmerica
Disclosure Incorporated
Document Center
DOCUMENT SYSTEMS, INCORPORATED
Donnelley Directory (D&B)
Donnelley Information Publishing (D&B)
Donnelley Marketing Information Services (D&B)
Rueben H. Donnelley (D&B)
Dow Jones & Company Inc.
Dow Jones Audiotex Services
Dow Jones Broadcast Information Services
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Dun & Bradstreet Information Systems
Dun & Bradstreet International
Dun & Bradstreet Planning Services
Dun & Bradstreet Program Management Services
Dun & Bradstreet Receivable Management Services
Dun & Bradstreet Reports Magazine
Pat Dunbar & Associates
Dun's Business Month
Dun's Marketing Services

DunsGate (D&B)
DunsNet (D&B)
DunsPlus (D&B)
Duston Associates—Information Strategists

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Electronic Information Systems
Electronic Publishing Svcs., Inc.
Elrick & Lavidge, Inc. (Equifax)
Enercom, Inc. (Equifax)
Equifax Canada
Equifax Center for Information Research
Equifax Inc.
Equifax Insurance Systems, Inc.
Equifax Marketing Services
Equifax Research
Equifax Services Inc.
ERISCO (D&B)
Executive Telecom System, Inc. (BNA)
Expert Technologies, Inc.
Export Network, Inc.
Exporters Encyclopedia (D&B)
EXTRANET
Exxon Research and Engineering Company

Fairfax Advertising
FAXplus
FEICO (McGraw-Hill)
Anne Conway Fernald Consulting
FiberLan, Inc. (Bell South)
FIND/SVP
FINIS: Financial Industry Information Service
(Bank Marketing Association)
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FIRSTMARK
First Bank of Minneapolis Communications Industries Division
First Call (ITOL)
Five Star Services Company, Inc.
Focus Enterprise Group
Focus Research Systems (D&B)

The Freedonia Group
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Fulcrum Technologies Inc.
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Gale Research Company (ITOL)
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General Information Systems
Geocapital
Geographic Data Technology, Inc.
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Grolier Electronic Publishing, Inc.
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The Health Professions Publ. (Lippincott)
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Horizon Management Systems, Inc.

Forest Horton
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Human Resource Management Services (HRMS)
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IBM Corporation
IBM Information Network
IBM Information Services Software
IBM Information Systems Group
IBM/SRA, Inc.
IBM World Trade Americas
ICC Information Group Ltd.
ICS Office Technologies
IDA Ireland
IGW Information Group West Corporation
Illinois Bell (Ameritech)
IMS Agency Information
IMS International Inc.
Inbound Programs, Inc.
INDESYS, INC.
The Index Group
Indiana Bell (Ameritech)
iNet 2000 (Telecom Canada)
Inet Company of America
InFiNet (ITOL)
Info Globe (International Thomson)
Infomart (Southam Inc.)
InfoMedia Corp. (formerly Datatron)
Information America, Inc.
Information Consulting
Information Interface Investments
Information Market Indicators Inc.
INFORMATION ON DEMAND, INC. (Pergamon)
Information Policy Consulting
Information Publishing Corporation
INFORMATION SOURCES, INC.
Information Systems Marketing Company (ISM)
Information Workstation Group

INFORUM Associates
InfoStar, Inc.
InfoTech
IN. GATE Technology
INMAGIC Inc.
INNOVATION 128
INPUT
Installed Technology International
INSTINET CORPORATION (REUTERS)
Institutt for Journalistikk (Norwegian News Association)
INTELLENET, INC.
Intellibanc Corporation
Interactive Market Systems
Interactive Response Media
International Data Solutions Corp.
International Development Center
International Thomson Business Press, Inc. (ITOL)
International Thomson Communications Inc. (ITOL)
International Thomson Holdings Inc. (ITOL)
International Thomson Information Inc. (ITOL)
International Thomson Legal and Professional (ITOL)
International Thomson Organization (ITOL)
International Thomson Professional Publishing (ITOL)
International Thomson Publishing Co. (ITOL)
International Thomson Retail Press (ITOL)
International Thomson Technology (ITOL)
International Thomson Transport Press Inc. (ITOL)
International Transcription Services
Intertel Communications, Inc.
Investment Directions, Inc.
INVISION/Robbins Associates
IRIS Corporation

J F Enterprises
Jamaica National Investment Promotion
Jane's Information Group (ITOL)
Jane's Publishing Company Ltd. (ITOL)
Jaywyn Telecommunications, Ltd.
JJS Systems, Inc.

JOBNET, Inc.
The Journal of Commerce (Knight-Ridder)
The Jupiter Group (McGraw-Hill)

Kapor Enterprises
The KBL Group, Inc.
Marlyn Kemper
E.F. Keon Co.
Knight-Ridder Business Information Services
Knight-Ridder Commodity News Services, Inc.
Knight-Ridder Commodity Perspective Research Bureau
Knight-Ridder Financial Information
Knight-Ridder Financial News
Knight-Ridder Money Center
Knight-Ridder Tradecenter
Knowledge Access International, Inc.
Knowledge Resources, Inc.
KYODO NEWS INTERNATIONAL, INC.
KRS Remote Sensing

Land Decision Technologies
Landmark Publications (US WEST)
Laser Resources, Inc.
Lawler Associates
Leading National Advertisers
Learned Information, Inc.
Legi-Slate (Washington Post)
LIMA LINK srl
LINK Resources Corp. (IDC)
J. B. Lippincott Company
Arthur D. Little Information Services Practice
LOMALEX Audio Directories, Inc.
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Lotus Development Corporation Information Services Division
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Mainstream Data
Main Street Marketing U.S.A., Inc. (Praxis)
Malhotra & Associates, Inc.

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Management Information Technology Inc.
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Market Data Retrieval (D&B)
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MISSION: A Consulting Group

Mitchell International
MLR Publishing Company
MMS International
MMS International Hong Kong (MMS)
MMS International U.K. (MMS)
Monchik-Weber (McGraw-Hill)
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Moore Data Database Publishing Group
Mortgage Commentary Publications (ITOL)
Morgan Rand Publications, Inc.
MORTEK Corporation
David Moses Consulting
Mountain Bell (U S WEST)
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Nielsen Clearing House (D&B)
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Wall Street Computer Review
WANG Financial Information Services Corp.
The Warbler Group
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The Washington Post
The Washington Post Company
Washington Service Bureau
Washington Post/LA Times
Waters Information Service, Inc.
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WESTLAW (West Publishing)
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(8)

No. 88-293

Supreme
F I L
DEC 2
JOSEPH F. S
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, et al.,

Petitioners,

—against—

JAMES EARL REID,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF MAGAZINE PUBLISHERS OF AMERICA, INC., THE HEARST CORPORATION, THE NEW YORK TIMES COMPANY, PLAYBOY ENTERPRISES, INC. AND TIME INCORPORATED IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*

Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership 218 magazine publishers who publish 846 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

The Hearst Corporation ("Hearst") is a diversified privately held company which is engaged in a broad spectrum of commercial activities, including communications. It publishes newspapers, magazines and hard-cover and soft-cover books. Additionally, Hearst owns and operates a leading feature syndicate, television and radio broadcast stations and cable television systems.

The New York Times Company publishes numerous magazines and newspapers, including *The New York Times*, a daily newspaper with a nationwide circulation, and some thirty-five daily and weekly newspapers; it also owns radio, television and cable properties. *The New York Times* has a daily circulation of 1.1 million and a Sunday circulation of over 1.6 million.

Playboy Enterprises, Inc. ("Playboy") is a marketing and media company that publishes consumer magazines, merchandises Playboy's Rabbit Head Design and other trademarks through product and magazine licensing, publishes catalogues as part of its direct marketing operation, and produces and markets video programming for television and home video.

Time Incorporated is the largest publisher of general circulation magazines in the United States. Among the magazines it publishes are *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money* and *Life*.

SUMMARY OF THE ARGUMENT

Under the Copyright Act of 1976, 17 U.S.C. §§ 101, *et seq.* (1982), (the "1976 Act"), a work created by an independent contractor is a "work made for hire" (or "work for hire") if the person for whom the work was prepared exercises supervision and direction over the independent contractor. The 1976 Act vests copyright ownership in an employer in the case of a work for hire. 17 U.S.C. § 201(b). A work for hire is defined as "(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use [within nine delineated categories] if the parties expressly agree in a written instrument . . . ." *Id.* at § 101.

Courts construing both the Copyright Act of 1909, 17 U.S.C. §§ 1, *et seq.* (1970) (the "1909 Act") and the 1976 Act consistently included within the definition of employee an independent contractor who is supervised and directed by the party commissioning the work. The present case is before this court because the Court of Appeals for the District of Columbia below, following the Fifth Circuit decision in *Easter Seal Society For Crippled Children and Adults of Louisiana v. Playboy Enterprises, Inc.*, 815 F.2d 323, *reh'g denied*, 820 F.2d 1223 (5th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1280 (1988), has suggested that this established definition be scrapped in favor of a far more restrictive definition of employee which would include only salaried employees or persons who are employees under the requirements of agency law. Such a confining definition finds no support or justification in the language of the 1976 Act, the legislative history of the 1976 Act or the policy underlying the Copyright Clause of the United States Constitution to foster and stimulate the creation of intellectual work for the public good.

Although the 1976 Act does not define "employee"[1] as used in section 101 or "employer" as used in section 201(b), or

1 Contrary to the conclusion of the Court of Appeals below (*Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1494 (D.C. Cir.), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 7, 1988) (No. 88-293)), the term "employee" as used in the 1976 Act is not the same as "employee" within the meaning of agency law. See Restatement (Second) of Agency § 220 (1958).

"other person for whom the work was prepared" as used in section 201(b), courts have interpreted these terms to include employment relationships involving independent contractors who are supervised and directed. The element of supervision must be determinative of whether an employment relationship exists within the meaning of the Copyright Act—the other factors set out in the Restatement of Agency (*e.g.*, location of the work, the hours worked and the manner of payment) should not be. In determining whether a work is a work made for hire without a writing under section 101, courts must decide whether an employment relationship exists under subsection (1) of the definition (*i.e.*, whether the commissioning party supervised and directed the contractor). If such a relationship exists, the work must be deemed to be a work for hire, without consideration of subsection (2).

In the case at bar, the Community for Creative Non-Violence ("CCNV") conceived the entire work, including not only the sculpture executed by James Earl Reid ("Reid"), but also the steam grate and pedestal. CCNV specified the material Reid was to use in the sculpture and the resources he was to spend. Reid continually conferred with CCNV to ensure that the sculpture conformed to CCNV's concept and met CCNV's requirements for the entire work. Such ongoing and extensive supervision and direction compels the conclusion that Reid was an employee of CCNV within the meaning of the 1976 Act. In fact, CCNV's control over the sculpture exceeds the amount present in some "formal" employment relationships.

The legislative history of the 1976 Act supports the "supervision and direction" test for determining whether a work is for hire. When it enacted the 1976 Act, Congress implicitly approved of and adopted the judicial definition of the work made for hire provision which developed under the 1909 Act. Under the 1909 Act, which also provided that employers owned

the copyrights in works for hire and which also failed to define "employer," the courts held that if the employer supervised and directed the work of an independent contractor, the work would constitute a work for hire. When Congress passed the 1976 Act, it was aware of this traditional definition of the employment relationship. In declining to adopt a different definition of employer, Congress implicitly adopted the judicial interpretation of the term developed under the 1909 Act, which also provided that employers owned the copyright in the work.

Publishers of newspapers and magazines have a particularly strong interest in maintaining the "supervision and direction test" in those instances where they bring the work into existence through freelance designers, graphic artists, illustrators, writers, and photographers. Publishers through their editors often call freelancers after the editors have already conceived of a detailed concept for a work and of the manner in which it should be executed. Editors also make substantial changes in work submitted by freelancers so that the work conforms to the publisher's own concept and style.

Congress did not intend to divest publishers of copyrights in works they conceive, supervise and direct. The effect of such a policy would be to discourage the creative process because the party with greatest control and supervision over the form of the finished work would no longer have the requisite incentive to create.

ARGUMENT

I

MAGAZINE AND NEWSPAPER PUBLISHERS MUST RELY UPON WORK FOR HIRE RELATIONSHIPS WITH CONTRIBUTORS THEY SUPERVISE AND DIRECT

Magazine and newspaper publishers rely upon a variety of contributors in the preparation of written and illustrative material. However, it is frequently the publisher who conceives, inspires, shapes and directs the creative process. In such instances, without the driving energy of the publisher, the work would not be created. In order to nurture such creativity, the 1976 Act and its predecessor statute deliberately vested copyright ownership in employers, such as publishers, who direct and supervise the work of their contributors.

The 1976 Act treats in distinct ways publishers' relationships with various kinds of contributors. Some contributors are formal, salaried employees. With respect to such employees, the publisher withholds income taxes, deducts social security payments and unemployment compensation from their pay checks, and regularly includes them in the publisher's health and benefit plans. There can be no dispute that under subsection (1) of the work for hire definition of the 1976 Act, works produced by these employees are owned by the publisher.

On the other extreme of the spectrum, a significant number of contributors either have created work on their own or have been retained to create a work in the manner determined by the contributor, free of supervision and direction by the publisher. In the absence of a written agreement to the contrary, these writers, photographers and illustrators are presumed to have granted to the publisher one-time publication rights in an article, photograph or drawing under § 201(c) of the 1976 Act. Frequently, the contributor has already written the article or taken the photograph at the time the editor approaches her or him seeking the right to publish the work, or he or she submits the work to the editor for possible publication. On other occasions, a writer or photographer may suggest an interesting sub-

ject for possible publication and after obtaining the acquiescence of the editor of the magazine or newspaper, submits a final draft of the article or photograph. In these situations, the writer or photographer initiates or generates the creative concept, and the publisher is simply the medium for the expression and dissemination of that idea. As a result, both the publisher and the contributor understand that as a matter of law, custom and logic, the contributor, as creator, owns the work; the publisher merely obtains a one-time right to publish the work.

Publishers also employ, to a significant extent, contributors who are retained on a regular basis by the publishers, but are not salaried employees, even though they perform similar types of tasks. An editor may call in a non-salaried employee to prepare a specified piece of work, in accordance with the editor's concept and approach. For example, an editor of a weekly newsmagazine may ask an illustrator to prepare a line drawing to illustrate a staff-created article. In connection with such an assignment, the editor describes to the illustrator the nature of the desired drawing. If the drawing is not executed in accordance with the editor's design and specifications, the editor will insist that it be redrawn. Under the 1976 Act, a work created within this type of relationship constitutes a work made for hire by the publisher within subsection (1) of the work for hire definition since the person creating the work (here, the line drawing) is the editor and not the illustrator.

Similarly, some non-staff writers regularly act as "stringers" who cover stories in particular locales for a newspaper or weekly newsmagazine. The stringer obtains the facts and calls in the story or faxes a draft of the story to the publication. The editors then revise the article and make changes for accuracy, style, grammar, and punctuation. On occasion, an editor will alter the scope and viewpoint of the article to conform to the editor's concept and approach. The publisher may also assign a stringer to cover a discrete portion of a larger story, which portion is incorporated into the complete article.

As another example, an editor of a newspaper or magazine may conceive of a feature article with a particular subject, style and point of view. In such instances, the editor telephones the freelancer and describes the storyline and the desired focus of the article. The editor may also provide the writer with names, addresses, and telephone numbers of potential sources. Once the writer has completed her or his research and brought the first draft of the article to the office, the editor often line edits the story and publishes the article without further redrafting by or input from the writer.

In each of the above examples, the publisher, through its editor, conceives, supervises and directs the scope, content and style of the art work or article to be executed by the freelancer. The 1976 Act considers this type of relationship an employment for hire relationship and deems the publisher the owner of the copyright. Neither party to this relationship considers the article or illustration to be a joint work since the final version is entirely within the control of the publisher.

Since the 1909 Act, publishers have come to depend on these non-salaried employees based on their understanding that the copyright laws designated the publishers as the copyright owners for works created with supervision and control. Publishers have had no reason to assume that these non-salaried employees who perform the same tasks as salaried employees would be treated any differently. Magazine and newspaper publishers, consistent with the 1976 Act, do not have to resort to a formal writing which is required for unsupervised and undirected work under subsection (2) of the work for hire definition. The law permits these publishers to maximize flexibility in the creative process by permitting them to retain contributors (whom they supervise and direct) on a work for hire basis under subsection (1) of the definition. The broad view of employment under the 1976 Act[2] is not only consistent with the Act's long history of

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2 If this Court upheld the interpretation of the work for hire definition by the Court of Appeals below, there would be a devastating impact on the software programming industry. Creators of software

interpretation and with the Copyright Clause of the Constitution but also with our society's commitment to expansive and robust speech based in the First Amendment.

II

UNDER THE COPYRIGHT ACT OF 1976 A WORK CREATED BY AN INDEPENDENT CONTRACTOR UNDER THE SUPERVISION AND DIRECTION OF AN EMPLOYER CONSTITUTES A WORK MADE FOR HIRE

The copyright in the sculpture conceived by CCNV plainly belongs to CCNV and not to its employee, Reid. Under the 1976 Act, a work executed by an independent contractor, such as Reid, is a work made for hire where the employer exercises direction and supervision over the independent contractor's work. Section 201(b) of the 1976 Act provides:

> In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

Section 101 of the 1976 Act defines "work made for hire" as

> (1) a work prepared by an employee within the scope of his or her employment; or

programs hire persons to implement and execute the creative concept. Since computer programs do not fit within any of the nine categories under subsection (2) of the work for hire definition, the creator could own the software program (under the view of the Court of Appeals below) only if the programmer or freelancer could be construed as an employee under agency law. The requirement for all software creators to hire all programmers as salaried employees would undoubtedly stifle the creation of new and novel programs. Other works which are not within the nine categories of subsection (2) (such as corporate annual reports) can only be prepared by salaried employees in order for the employer/commissioning party to have permanent ownership and control of those works during the period covered by copyright.

> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire . . . .

17 U.S.C. § 101.

A. The Legislative History of the 1976 Act Did Not Disturb the Established Meaning of Employee Under the Work For Hire Doctrine Developed Under the 1909 Act

In the 1976 Act, Congress did not define or otherwise clarify the terms "employee" or "employment" as contained in the work made for hire definition in section 101 of that Act. It is axiomatic that this Court should refer to the legislative history, *Blum v. Stenson*, 465 U.S. 886 (1984), or case law interpreting a preexisting statute in order to construe an ambiguous or undefined term in an existing statute. *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates*, 459 U.S. 297, 318-321 (1983); *United States Department of Health and Human Services v. Smith*, 807 F.2d 122 (8th Cir. 1986).

The legislative history of the 1976 Act is of limited use in discerning Congress' intent in using the term "employee." Although Congress held hearings and solicited reports for over twenty years prior to the enactment of the 1976 Act, the scope of the term "work for hire" received scant attention by Congress. A review of the legislative history reveals an absence of any Congressional debate regarding the definition of the employment relationship within the meaning of the definition of work for hire. 3 A. Latman & J. Lightstone, *The Kaminstein Legislative History Project: A Compendium and Analytical Index of Materials Leading to the Copyright Act of 1976* 327-377 (1983). In addition, the law review articles and other commentaries cited by the Court of Appeals below, *Community for*

Creative Non-Violence v. Reid, 846 F.2d 1485, 1489 (D.C. Cir.), *cert. granted*, 57 U.S.L.W. 333 (U.S. Nov. 7, 1988) (No. 88-293), fail to identify any legislative history in which Congress defined the term "employee" as a *salaried* employee. Although the Court of Appeals was "particularly impressed" by commentary of these copyright scholars, the fact is that these commentators based their interpretation of the work for hire definition entirely on what they construed to be Congress' intent. The lack of Congressional discussion, therefore, does not support their analysis and furthermore underscores the need to consider prior decisions interpreting the work for hire doctrine and the nature of an "employee" under the 1909 Act.[3]

Congress was certainly aware of the developed case law definition of "employee" under the 1909 Act. *See Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984). Courts had generally found a work for hire relationship if the commissioning party exerted some supervision and direction over the person preparing the work. *Epoch Producing Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 744 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976); *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216-17 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972); *Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 643 (2d Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968). When Congress uses a term with a judicially interpreted meaning, courts presume that Congress intended to adopt that meaning. *Perini*, 459 U.S. at 318-321; *Thorn v. Browne*, 257 F. 519 (8th Cir.) *cert. denied*, 250 U.S. 645 (1919); N. Singer, *Sutherland Statutory Construction*, § 47.30 (4th Ed. 1984). Moreover, Congress is presumed to know the case law extant at the time it passes a new statute. *Sutherland* at § 50.01. If Congress did not express an intention to change the existing law, the courts should not infer such an intention. *Id.*

There is evidence, however, that Congress *considered* and *rejected* a proposal to limit the definition of works made for

3 Section 26 of the 1909 Act defined "author" to ". . . include an employer in the case of works made for hire."

hire to works created under a formal salaried employment relationship and to eliminate works by non-salaried employees from its scope. Although he did not advocate such a modification, Borge Varmer, then Attorney-Adviser of the Copyright Office, suggested in the proposal prepared for a Senate subcommittee that

> [i]f the employment-for-hire rule is not to extend to works created on commission at a fixed fee, the definition might further specify "employment on a salary basis."

B. Varmer, *Works Made For Hire and on Commission*, Studies Prepared for the Subcommittee on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 2d Session 127, 141 (Comm. Print 1960) ("Varmer Study"). Congress did not accept this proposal—since it seems it was satisfied with the broader definition.

Even the Fifth Circuit recognized that under the 1909 Act the term employee included independent contractors that were supervised and directed and that to limit the definition of the employment relationship to include only formal salaried employment relationships would be a radical departure from earlier law. *Easter Seal*, 815 F.2d at 330. If Congress had intended to alter the existing law, it would have made its intention clear in the words of the statute and in the legislative history. *Id.* at 331; *Aldon Accessories*, 738 F.2d at 552. Not only was no such intention expressed, but also Congress affirmatively stated its intention *to reenact the prior law*. In the first line of the House Report accompanying the bill which was ultimately adopted, Congress stated the law's intent:

> Section 201(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5659, 5736 ("House Report").

It is not the proper role of this Court to infer a Congressional intent to alter drastically prior law where Congress has failed to indicate such an intention. In fact, bills have recently been introduced in the U.S. Senate to change the definition of work made for hire to include only employees who receive employment benefits and whose taxes are withheld from their compensation. S. 1223, 100th Cong., 1st Sess. (1987); S. 2330, 99th Cong., 2d Sess. (1986). The authority to change the law in this respect resides in the Congress.

On the other hand, it is apparent from subsection (2) of the definition of work for hire that Congress *did* intend to limit the extent to which unsupervised commissioned parties could fit within the work made for hire definition. In the House Report, Congress described its purpose with regard to subsection (2) in the following manner: "The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as 'works made for hire,' and those that should not." House Report at 121. This definition of work for hire still compels a court to determine at the outset whether the hired party was supervised and directed so as to be considered an "employee" within the meaning of subsection (1) or whether the hired party is free of supervision and direction and, therefore, is eligible under subsection (2). *Aldon Accessories*, 738 F.2d at 552.

According to the *Aldon* court, Congress enacted subsection (2) of the definition in order to reverse the presumption under the 1909 Act that the copyright in works prepared by unsupervised and undirected independent contractors belonged to the hiring party. *Aldon Accessories*, 738 F.2d at 552; *see, e.g., Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298 (9th Cir. 1965) (presumption that hardware company which hired but did not supervise an artist to illustrate its catalogue owned the copyright in the drawing). Relying on the presumption set forth in these early cases, several courts held that the party at whose "instance and expense" the work was created owned the copyright. *See Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966) (copyright in advertising

copy belongs to advertisers at whose request newspaper created the advertisement).[4]

According to the *Aldon* Court, "[i]t was apparently felt that this [presumption] frequently worked an injustice in those situations where the contractor did all of the creative work and the hiring party did little or nothing." *Aldon Accessories*, 738 F.2d at 552 (citing House Report at 121). The Court made it clear, however, that Congress did not thereby intend to dispense with the traditional test for the existence of an employment relationship under subsection (1):

> But there is no indication in the legislative history or elsewhere that Congress was focusing on contractors who were actually sufficiently supervised and directed by the hiring party to be considered "employees" acting within the "scope of employment."

Id.

Courts interpreting the 1909 Act focused on the degree of the commissioning party's supervision and direction over the contractor in determining whether an employment relationship existed. *See* 1 Nimmer & Nimmer, *Nimmer On Copyright*, § 5.03 [B], at 5-13 (1988). In *Epoch Producing*, a film production company ("Epoch") claimed that it owned the copyright in the movie *The Birth of a Nation* because D.W. Griffith ("Griffith"), the film's producer and director, was an employee who made the film for Epoch as a work made for hire. 522 F.2d at

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4 In *Easter Seal*, the Fifth Circuit inaccurately charts the development of the work made for hire cases under the 1909 Act by suggesting that since *Brattleboro*, the determination of an employment relationship had degenerated into a pure "instance and expense" test. 815 F.2d at 325-27. The *Easter Seal* Court describes the cases in this way to support the view that Congress intended to limit severely the type of relationship that could qualify as employment. *Id.*

But *Easter Seal* ignores the cases in Point II B, *infra*, and in *Aldon Accessories*, 738 F.2d at 552, where a court looked to the extent to which the commissioning party supervised the contractor to determine whether an employment relationship existed. *See Epoch Producing*, 522 F.2d at 744; *Picture Music*, 457 F.2d at 1216-17; *Donaldson Publishing Co.*, 375 F.2d at 643.

741. In rejecting Epoch's claim, the Second Circuit pointed to a lack of evidence of an employment relationship between Epoch and Griffith. *Id.* at 744. Specifically, the Court noted that there was no evidence that Epoch had controlled or supervised Griffith's work:

> The evidence relied upon by Epoch does not, for instance, indicate whether [Epoch] simply supplied capital for the production of the picture, whether they commissioned Griffith independently to produce the film, whether they "hired" Griffith as employee to do the work *and, most important, whether they could have exercised the requisite power to control or supervise Griffith's work, which is the hallmark of "an employment for hire" relationship.*

Id. (citations omitted) (emphasis added). *See Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640 (S.D.N.Y. 1970), *aff'd*, 457 F.2d 1213 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972) (the court determined that plaintiff's predecessor in interest, a song writer who was hired by a music company to adapt an existing song, was an employee for the purposes of work made for hire); *Rytvoc, Inc. v. Robbins Music Corporation*, 289 F. Supp. 136 (S.D.N.Y. 1967) (extent of employer's right to exert supervision and control is the determinative factor in question of whether songwriter composed song as work made for hire).

Indeed, there is evidence in the legislative history that Congress differentiated between a "work specially ordered or commissioned" and a "work prepared by an employee within the scope of his employment" in order to distinguish between the hiring party who sufficiently supervises and controls his employee and the hiring party who simply hires a person to create a work but provides no such supervision or control. In his study, Varmer articulated this distinction:

> [T]he common law generally has differentiated between the employer-employee relationship and that of the parties to a contract for a commissioned product: in broad terms, the acts of an employee as such are imputed to his employer, but those of an independent contractor are not imputed to the person for whom he performs a special commission. *Underlying this distinction is the premise that an employer generally gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor.* Perhaps in recognition of this principle, the statutory provisions in the United States regarding the employer's ownership of copyright in works made for hire . . . have not been extended to commissioned works generally.

Varmer Study at 142 (emphasis added). Thus, it is the element of control which is crucial in determining the difference between a work created pursuant to an employment relationship and a commissioned work. As Varmer recognized, "[t]he differences in type of payment or regularity of working hours between the employment and commission situations would not seem to be crucial reasons for different treatment." Varmer Study at 142.

Furthermore, the *Aldon* approach of determining the presence of an employment relationship on the basis of control advances the general policy underlying the 1976 Act and the Constitution of the United States. That policy, as set forth in the committee report accompanying the 1909 Act was quoted at a Congressional hearing in 1965:

> The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.

Copyright Law Revision Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 before Subcomm. No. 3 of the House Judiciary Comm. 89th Cong., 1st Sess. 30 (Comm. Print 1966) (prepared statement of George Cary, Deputy Register of Copyrights). *See* U.S. Const. art. 1, § 8; House Report at 47. The purpose of promoting the public interest is advanced by grant-

ing copyright ownership to the party who has caused the work to be shaped into its final form. In the employment relationship work for hire cases, none of the works involved would have been created absent the initiative, supervision and direction of the commissioning party. See Point II B, *infra*. It is this party who must be given the incentive to create. As Varmer recognized, the formalities of the employment relationship do not determine the presence of such control. It is the policy of the 1976 Act, therefore, to ensure that the commissioning party—the initiating party—who exercises supervision and direction over its employee will own the copyright in the resulting work.

B. The Supervision and Direction Test Has Been Adopted By Numerous Courts in Interpreting the Work Made For Hire Definition In Section 101 of the 1976 Act

The judicial view under the 1909 Act that a work for hire encompassed more than a formal salaried employment relationship was adopted by several courts in construing the "work made for hire" definition under section 101 of the 1976 Act. Indeed, courts have continued to rule that the critical factor in identifying the existence of an employment relationship under the Act is whether the employer *exercised its right to direct and supervise* the employee-contractor's performance. *Evans Newton Incorporated v. Chicago Systems Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986); *Aldon Accessories*, 738 F.2d at 548; *Nadel & Sons Toy Corp. v. William Shaland Corporation*, 657 F. Supp. 133 (S.D.N.Y. 1987); *Marshall v. Miles Laboratories, Inc.*, 647 F. Supp. 1326 (N.D. Ind. 1986); *Iris ARC v. S.S. Sarna, Inc.*, 621 F. Supp. 916 (E.D.N.Y. 1985).

Other courts, although finding that no employment relationship existed in particular cases, have applied the "supervision and direction test" to the facts before them. *See, e.g., Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987); *Joseph J. Legat Architects, P.C. v. United States Development Corporation*, 625 F. Supp. 293 (N.D. Ill. 1985); *Sandwiches, Inc. v. Wendy's International, Inc.*, 654 F. Supp. 1066 (E.D. Wis.), *appeal dismissed*, 822 F.2d 707 (1987);

Sygma Photo News, Inc. v. Globe International, Inc., 616 F. Supp. 1153 (S.D.N.Y. 1985); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Construction Company*, 542 F. Supp. 252 (D. Neb. 1982).

In *Aldon Accessories*, Aldon, a designer and manufacturer of brass and porcelain figurines brought an action against Spiegel alleging that Spiegel had infringed its copyright in certain brass figurines designed in the form of a unicorn. 738 F.2d at 551. In its defense, Spiegel claimed that Aldon's copyright as a work made for hire was invalid since Aldon had commissioned certain companies in Japan and Taiwan to create and manufacture the figurines and those companies did not fit within either part of the work for hire definition in section 101. *Id.*

The Second Circuit rejected Spiegel's "overly restrictive interpretation of subdivision (1)" of the definition and expressly held that the 1976 Act did not abandon the definition of an employee which had developed under the 1909 Act. *Aldon Accessories*, 738 F.2d at 551-52. Applying that standard to the facts in *Aldon*, the Second Circuit held that there was ample evidence for the jury's finding that Aldon had exerted sufficient supervision and direction over the manufacturers to bring the figurines within the work made for hire doctrine. *Id.* at 553.

Several courts have adopted and applied the *Aldon* "supervision and direction" test. For example, in *Evans*, the Seventh Circuit expressly adopted the *Aldon* standard for determining whether a work constituted a work made for hire under the 1976 Act. That Court found "the Second Circuit's analysis and conclusion [in *Aldon*] compelling." 793 F.2d at 894. In *Evans*, plaintiff, a corporation which provided recordkeeping systems to educational institutions, had hired defendant, a computer programming firm, to program a new management program to be compatible with a Commodore computer. *Id.* at 891. The Court found that before hiring defendant, plaintiff's president

> . . . wrote the system bid guidelines with programming specifications. This included flow diagrams and prepared numbering and coding systems. [He] also developed sam-

> ple printouts and reports incorporating all of the concepts developed by [plaintiff] for computer-managed instruction.

Id. The Seventh Circuit affirmed the District Court's determination that plaintiff's preparatory work demonstrated that it had sufficiently supervised and directed defendant's programming work. *Id.* at 894. *See also Nadel & Sons Toy Corp.*, 657 F. Supp. at 133 (motion for summary judgment by company hired to create a unicorn statuette for plaintiff denied because plaintiff set forth facts indicating plaintiff's president may have exercised control in instructing changes in samples); *Marshall*, 647 F. Supp. at 1326 (company for whom scientist worked owned copyright in certain of the scientist's papers under work made for hire since company had exercised its policy of reviewing and approving all papers which were to be submitted by its employees).

This case law strongly supports the view that the 1976 Act did not change the meaning of the terms "employee" or "employer" which had developed under the 1909 Act. Applying the *Aldon* standard to the instant case, it is clear that plaintiff CCNV should be considered the author of the statue under subsection (1) of the definition of work for hire as set forth in the 1976 Act.[5] The facts show that representatives of CCNV exercised significant supervision and direction over the work of sculptor Reid. As with the representative of Aldon, members of CCNV conceived of, in "starkly specific detail," the statue as:

> a sculpture of a modern Nativity scene in which, in lieu of the traditional Holy Family, the two adult figures and the infant would appear as contemporary homeless people huddled on a streetside steam grate. The family was to be black (most of the homeless in Washington being black); the figures were to be life-sized, and the steam grate would be positioned atop a platform "pedestal," or base, within which special-effects equipment would be enclosed to emit

5 Indeed, the Court of Appeals conceded that if the *Aldon* test applied, the statue would be a work for hire, owned by CCNV. *Community For Creative Non-Violence*, 846 F.2d at 1497, n. 18.

> simulated "steam" through the grid to swirl about the figures. They also settled upon a title for the work—"Third World America"—and a legend for the pedestal: "and still there is no room at the inn."

Community For Creative Non-Violence v. Reid, 652 F. Supp. 1453, 1454 (D.D.C. 1987), *rev'd*, 846 F.2d 1485 (D.C. Cir.), *cert. granted*, 57 U.S.L.W. 3333 (U.S. Nov. 7, 1988) (No. 88-293).

In addition, CCNV members spoke with Reid on two separate occasions to discuss the form of the statue (*id.* at 1454), Reid provided preliminary sketches of the figures (*id.* at 1455), CCNV took Reid on a tour of the Washington homeless and suggested a family to be used as models. *Id.* Of great significance, CCNV assumed responsibility for constructing the steam grate and the pedestal upon which the sculpture would sit. *Community For Creative Non-Violence*, 846 F.2d at 1487. During the course of the project Reid conferred "from time to time with various CCNV members and [made] changes to the form and arrangement of the figures to accommodate CCNV's requests." *Id.* at 1487-8.

CCNV's substantial contribution to the statue—from conception to completion—demonstrates that it should be considered the author of the sculpture. As in *Aldon*, CCNV was "in a very real sense the artistic creator" of the statue. *Aldon Accessories*, 738 F.2d at 553. As the District Court concluded:

> [CCNV] then engaged Reid to utilize his representational skills, rather than his original artistic vision, to execute it. And while much was undoubtedly left to his discretion in doing so, CCNV nevertheless directed enough of his effort to assure that, in the end, he had produced what they, not he, wanted, notwithstanding his creative instincts may have been in harmony with theirs.

Id. at 1456.

The relationship between CCNV and Reid is remarkably similar to the typical relationship between a magazine or newspaper publisher and the freelance writers and graphics people it

employs for a given issue. The editorial product is very much the creation of the publication. A freelancer is often sent to a specific location at the publication's expense to do a specific assignment in conformity with the editor's instructions. Upon the freelancer's completion of the assignment, the product is reworked and edited to conform to the publication's approach and style. The work product is thus owned by the publisher.

CONCLUSION

An independent contractor supervised and directed by a commissioning party is an employee, and the work created under such a relationship is a work made for hire, within the meaning of the 1976 Act. Courts adopted that definition under the terms of the 1909 Act. In enacting the 1976 Act, Congress did not intend to alter the established meaning of an employee. Instead, Congress intended to further the Constitutional policy of promoting science and the useful arts. This goal can only be accomplished by vesting copyright in the party which conceives and commissions the work and supervises its execution. The courts consistently held this view under the 1976 Act until the decision below in the instant case and the Fifth Circuit's decision in *Easter Seal*. A restrictive definition of employee, based solely on agency law criteria, would inhibit the very purpose Congress sought to achieve. If there is to be a change in the law it should not be made by affirming the Court below, but rather by referring the questions back to Congress for any change in the meaning and interpretation of the law enacted in 1976. Accordingly, this Court should reverse the decision of the Court of Appeals for the District of Columbia.

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Supreme Court of the United States
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COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Petitioners,

v.

JAMES EARL REID,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE PROFESSIONAL PHOTOGRAPHERS OF AMERICA, INC. IN SUPPORT OF RESPONDENT

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IN THE

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Petitioners,

v.

JAMES EARL REID,
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**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF *AMICUS CURIAE* OF THE PROFESSIONAL PHOTOGRAPHERS OF AMERICA, INC. IN SUPPORT OF RESPONDENT

The Professional Photographers of America, Inc. submits this brief *amicus curiae* in support of respondent. The parties to this action have given their written consent to the filing of this brief pursuant to Rule 36 of the Rules of this Court. The letters of consent have been filed with the clerk.

INTEREST OF THE *AMICUS CURIAE*

The Professional Photographers of America, Inc. ("PPA") is the largest professional society in the United States promoting the interests of professional photographers. PPA represents approximately 18,000 members, most of whom depend for their livelihood on copyright protection for their works.

Professional photographers commonly create portraits and other photographs on commission or order for members of the public. Such works are created outside of traditional employment relationships. Independent photographers and photographic studios rely on the revenue from reprints and other exploitation of the copyrights in their works to recover their expenses and earn any profit. Their creative incentive is dependent on their recognition as copyright owners.

As will be discussed below, the legislative history demonstrates that photographers' interests were specifically considered and vindicated by Congress in the provisions of the 1976 Copyright Act (the "1976 Act")[1] at issue in this case. The Second Supplementary Report of the Register of Copyrights on copyright revision specifically acknowledged that "[a]rtists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law, and it seems clear that, like serious composers and choreographers, they were not intended to be treated as "employees" under the carefully-negotiated definition [of works made for hire]."[2] Thus, photographers have a recognized interest in the proper interpretation of the work for hire doctrine.

Despite the clear history and language of the 1976 Act, professional photographers have found it necessary to defend their rights in litigation against photofinishers who unlawfully duplicate copyrighted portraits. PPA currently is participating in four such lawsuits involving the issues of work for hire and joint authorship.

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[1] Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (1982 & 1986 Supp. IV).

[2] Copyright Office, *Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill, October—December 1975*, ch. XI at 12-13 (Draft ed. 1975) [hereinafter "Second Supplementary Report"].

The Court of Appeals in this case correctly interpreted the work for hire[3] provisions of the 1976 Act. The interpretation advocated by petitioners would destroy the carefully negotiated compromise adopted by Congress and could cloud the clear protection Congress provided to professional photographers.

Moreover, petitioners, certain *amici*, and the Court of Appeals have discussed the relationship of the doctrine of joint works to the work for hire issue. Proper interpretation and integration of this doctrine with that of work for hire is essential to the protection Congress afforded photographers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the 1976 Copyright Act, and consistent with the Constitutional mandate "To promote the Progress of Science and useful Arts,"[4] the person who creates an artistic work is the author and original copyright owner except in certain specific cases. As the Register of Copyrights explained in the Second Supplementary Report on copyright revision, "the individual author is the fountainhead of copyright protection."[5] Under one exception to this general principle, "the employer or other person for whom the work was prepared is considered the author" in the case of a "work made for hire." 17 U.S.C. § 201(b) (1982). Work made for hire is defined in the Act as "(1) a work prepared by an employee within the scope of his or her employment;" or (2) certain specifically enumerated "specially ordered or commissioned" works under certain circumstances. *Id.* § 101.

The work for hire provision of the Copyright Act emerged as a carefully balanced and nuanced compromise

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[3] We adopt the almost universal convention of using "work for hire" in place of the longer statutory term "work made for hire."

[4] U.S. Const. art. I, § 8, cl. 8.

[5] Second Supplementary Report, ch. XI at 9.

following a contested legislative history. That history demonstrates beyond cavil that the Congress and the Copyright Office, which served as Congress' draftsperson and mediator, intended a clear distinction between works created by employees acting within the scope of their employment (governed by clause 1) and works created by independent contractors on commission or special order (governed by clause 2).

By its language—"employee within the scope of his or her employment"—the 1976 Act invokes well settled principles of agency law. In ordinary usage, "employee" and "independent contractor" are mutually exclusive concepts of agency law. Moreover, the phrase "scope of employment" is a recognized term of art in agency. The ordinary meaning of the statutory language should govern.

Congress intended to limit application of clause 1 to salaried or other regular employees within the meaning of agency law. The legislative history reveals that all parties to the work for hire compromise adopted by Congress understood that

(i) "employee" means salaried or other regular agency-law employee

(ii) independent contractors creating "specially ordered or commissioned" works are not "employees" within the statutory definition, and

(iii) works created by independent contractors are governed exclusively under the rubric of works created on "special order or commission."

The key to understanding the legislative history is the timing of the work for hire debate that yielded the compromise. Work on copyright law revision began in 1955. The work for hire compromise was reached in 1965. That compromise was, with only minor changes, incorporated into the final 1976 Act.

Petitioners contend that Congress could not have intended to overturn what they claim to have been the "existing judicial approach" without so declaring. However, at the time the compromise was crafted in 1965, the existing law was generally, upon the Copyright Office's own analysis, that the work for hire doctrine applied only to salaried or other regular agency-law employees. The first case to extend the work for hire doctrine generally to include works of independent contractors was decided in 1966, the year after the terms of the work for hire compromise were in place.

The legislative history provides no support for the proposition that Congress intended to replace the delicate, long debated, and well-understood 1965 compromise with judicial interpretation of the 1909 Act after 1965. To the contrary, Congress explicitly adopted the 1965 compromise, as the Register of Copyrights publicly confirmed immediately prior to and shortly after adoption of the 1976 Act.

The interpretation of work for hire adopted by the Court of Appeals best achieves and serves the policies of the Act. It secures the protection of individual authors who are most in need of the protections and incentives afforded by copyright. Because independent authors may assign their copyright, the interests of commissioning parties are also protected.

Moreover, as the Court of Appeals correctly noted, the interpretation of work for hire advocated by petitioners would create substantial uncertainty with respect to copyright ownership of independent contractor works, requiring work-by-work evidentiary evaluation of the supervision and control exercised by the commissioning party, and application of an indeterminate, ill-defined standard.

Accordingly, the decision of the Court of Appeals should be affirmed.

In order to ensure that the protection afforded to independent individual authors under the work for hire doctrine is not circumvented, the doctrine of joint authorship must be appropriately defined and integrated. Courts have heretofore rebuffed efforts to expand the concept of joint authorship for that purpose. This Court should make clear that absent a substantial, copyrightable contribution, a commissioning party is not a joint author of a commissioned work.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT INDEPENDENT CONTRACTORS UNDER AGENCY LAW ARE NOT EMPLOYEES WITHIN THE MEANING OF THE COPYRIGHT ACT.

After carefully reviewing the language, legislative history, and judicial and scholarly interpretations of the work for hire doctrine, the Court of Appeals held that "a copyrightable work of an independent contractor cannot be a work made for hire under the current Act unless that work [meets the specific requirements of clause 2 of the definition]."[6] In reaching its conclusion, the Court of Appeals followed the thorough decision of the Fifth Circuit in *Easter Seal Society for Crippled Children and Adults v. Playboy Enterprises.*[7] In light of the ordinary meaning of the statutory language, its legislative history, and the policy of the work for hire doctrine, no other interpretation is supportable.

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[6] *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1494 (D.C. Cir. 1988).

[7] 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988). On January 13, 1989, the Ninth Circuit, after an in-depth review of the legislative history, aligned itself with the Fifth and D.C. Circuits, holding that clause 1 of the work for hire definition applies only to "formal, salaried employees." *Dumas v. Gommerman*, No. 87-6542, slip op. at 26 (9th Cir. Jan. 13, 1989) (LEXIS, Genfed library, USApp file).

A. The Ordinary Meaning of the Work For Hire Doctrine Distinguishes between Employee and Independent Contractor Works.

As petitioners have recognized, "[i]n construing the 1976 Act, 'it is appropriate to assume that the ordinary meaning of the language that Congress employed "accurately expresses the legislative purpose."'" Petitioners' Br. at 17 (quoting *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985)). This assumption is particularly appropriate because the definition of "work for hire" was the result of a carefully negotiated legislative "compromise."[8] *See, e.g., United States v. Sisson*, 399 U.S. 267, 291, 298 (1970) ("compromise origins" of an act "justify the principle of strict construction"); *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 617 (1981) (In interpreting the intent of Congress in fashioning a legislative compromise, "the wisest course is to adhere closely to what Congress has written.").

The "ordinary meaning" of the definition of "works for hire" is the meaning adopted by the Court of Appeals in this case and by the Fifth Circuit in *Easter Seal Society*. The definition divides works for hire into two classes—(i) works "prepared by an employee within the scope of his or her employment" and (ii) works "spe-

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[8] *See Dumas*, slip op. at 15-17, 22-23; *Copyright Law Revision*, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976) ("The work-made-for-hire provisions of this bill represent a carefully balanced compromise . . . . The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered works made for hire under certain circumstances."); H.R. Rep. No. 83, 90th Cong., 1st Sess. 87 (1967) ("After full consideration the committee decided to incorporate the substance and much of the language of this compromise in the bill."); Second Supplementary Report, ch. XI at 7 ("After a great deal of discussion and splitting of hairs, the definition of a 'work made for hire' which emerged in the bill . . . represented a carefully balanced compromise . . . .").

cially ordered or commissioned" under certain well defined conditions. 17 U.S.C. § 101.

In ordinary usage, an employee is "one employed by another usu[ally] for wages or salary and in a position below the executive level."[9] Regardless of whether the word "employee" is considered to have "definite content" (Petitioners' Br. at 17), in ordinary usage, "'employee' must be distinguished from 'independent contractor.'"[10] "Employee" and "independent contractor" are generally regarded to be mutually exclusive concepts governed by traditional agency law standards.[11]

Moreover, the phrase "scope of employment" is a widely used term of art in agency law.

> The word "employment" means the subject matter as to which the master and servant relationship exists. The phrase "scope of employment" means the extent of this subject matter and denotes the field of action within which one is a servant.

Restatement (Second) of Agency, § 228 comment a (1958); *see Easter Seal Society*, 815 F.2d at 335

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[9] Webster's Ninth New Collegiate Dictionary 408 (1983).

[10] Black's Law Dictionary 471 (5th ed. 1979) (further defining "employee" as "one who works for an employer; a person working for salary or wages").

[11] *See, e.g., Vane v. Newcombe*, 132 U.S. 220, 233-34 (1889) ("It seems clear to us that Vane was a contractor with the company, and not an employe within the meaning of the statute."); *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 520-21 (1926) ("Nor do the facts stated in the bill of exceptions establish that the plaintiffs were 'employees' within the meaning of the statute. So far as appears, they were in the position of independent contractors."); *Campbell v. Commisioner*, 87 F.2d 128, 130-31 (7th Cir. 1936) ("The question of whether or not a person is an employee of government or is an independent contractor has been before this and other courts many times."), *cert. denied*, 301 U.S. 688 (1937).

("'Scope of employment' is virtually a term of art in agency law").[12]

In short, by limiting clause 1 of the work for hire doctrine to employees acting within the scope of their employment, the 1976 Act invokes well settled, familiar principles of agency law.

B. The Legislative History of the Work For Hire Compromise Demonstrates a Clear Understanding that Independent Contractors Under Agency Law Were Not "Employees" Within the Meaning of the First Clause of the Definition.

The timing of the compromise that gave rise to the definition of works for hire in the 1976 Act is critical to understanding its legislative history. As this Court described in *Mills Music*, 469 U.S. at 159-61, the legislative process leading to the 1976 Act began in 1955 with the appropriation by Congress of funds for the Copyright Office to conduct a comprehensive series of thirty-four studies on major issues of copyright law. Study number thirteen of the series, completed by Borge Varmer in April 1958, focussed on "Works Made for Hire and on Commission."[13]

As petitioners have recognized (Br. at 28), "[t]he commissioned works controversy was effectively resolved in 1965 when eight interested groups representing book publishers, music publishers and artists entered into a compromise agreement covering a range of copyright

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[12] By cojoining the concepts of "employee" and "scope of employment," the language draws an obvious parallel to the doctrine of *respondeat superior*. *Cf. American Fed'n of Unions v. Equitable Life Assurance Soc'y.*, 841 F.2d 658, 665 (5th Cir. 1988) (*respondeat superior* applies to acts of "employee . . . in the course and scope of his employment"). This parallel was intended. *See* pages 13-14, *infra*.

[13] B. Varmer, *Works Made for Hire and on Commission*, Copyright Office Study No. 13, 86th Cong., 2d Sess. 123 (Comm. Print 1960) [hereinafter "Varmer Study"].

issues." *See Dumas*, slip op. at 15. Thus, the most relevant period for determining the content of the work for hire compromise is the period from 1958, when the Varmer Report was issued, through 1965. Later developments are useful principally for the light they shed on this earlier period.

The central thesis of petitioners' argument fails in the face of this timing. Petitioners contend that Congress could not have intended a radical departure from existing law without acknowledging the change: "[T]here is no indication whatsoever in the legislative history of the 1976 Act that Congress ever considered replacing the existing judicial approach with one that focussed exclusively upon agency law." *E.g.*, Petitioners' Br. at 16.[14]

However, as the legislative history demonstrates, between 1958 and 1965, the existing law was, generally, that "employee" within the meaning of work for hire referred to salaried or other regular agency law employees. It was not until 1966, in *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966), that a court, interpreting the 1909 Copyright Act,[15] first held that commissioned works should generally be treated as works for hire.[16]

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[14] *Id.* at 14-15 ("[T]here is absolutely nothing in the 1976 Act or its legislative history which evidences any Congressional intent to repudiate [the allegedly consistently applied supervision and control] standard."); *see id.* at 20.

[15] Copyright Act of 1909, 17 U.S.C. § 1 *et seq.* (1970).

[16] *See Easter Seal Society*, 815 F.2d at 326; Petitioners' Br. at 29. As petitioners recognize (Br. at 29), prior to 1966, a line of cases had imposed a presumption that an independent contractor had assigned his copyright to the commissioning party. *See, e.g., Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940). These cases, however, did not rely on the work for hire doctrine. *See Dumas*, slip op. at 7 n.4. It is, therefore, not surprising that they did not form the basis of the Register's and Congress' consideration of work for hire.

In short, the cases interpreting the 1909 Copyright Act, on which petitioners rely, actually were decided *after* the primary terms of the work for hire doctrine under the 1976 Act were settled in the legislative process. There is no indication anywhere in the legislative history of the 1976 Act that Congress intended to overturn the delicate and well-understood 1965 compromise in favor of the interpretation first adopted by the Second Circuit in 1966. To the contrary, as discussed below, Congress explicitly adopted the 1965 compromise in the 1976 Act.

In *Mills Music*, this Court described the legislative process that followed the issuance of the commissioned Copyright Office studies. In July, 1961, the Register of Copyrights issued a report containing recommendations for copyright revision.[17] Following numerous meetings with representatives of the various affected interests, the Register issued draft revision bills in 1963 and 1964 and received comments from interested parties. The Register then issued a Supplementary Report in 1965.[18] *See generally, Mills Music*, 469 U.S. at 159-61. Ten years later, as part of the hearings leading to final passage of the 1976 Act, the Register prepared a Second Supplementary Report, reviewing and explaining prior developments.[19]

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[17] *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st Sess. (Comm. Print 1961) [hereinafter "Register's 1961 Report"]; *see Mills Music*, 469 U.S. at 159.

[18] *Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 89th Cong., 1st Sess. (Comm. Print 1965) [hereinafter "Register's Supplementary Report"].

[19] Second Supplementary Report.

As a review of this history demonstrates, from the beginning of the copyright revision process until the 1965 compromise was reached, all parties[20] recognized that:

- "employees" meant salaried or other regular agency law employees;
- independent contractors were not "employees" within the definition of works for hire; and
- works created by independent contractors were discussed and considered exclusively under the rubric of works created on "special order or commission."

1. *The 1958 Varmer Study*

The propositions stated above appear unambiguously in the 1958 Varmer study, which formed the basis for later discussion of the work for hire issue. At the outset of the Study, Varmer identified three distinct ways a magazine publisher could obtain an article:

> (1) He may assign the task of writing the article to a *salaried* employee;
>
> (2) He may *commission* an author to write the article for a fixed fee;
>
> (3) He may acquire [by assignment or license] the article from an author who has written it on his own initiative.

Varmer Study, Committee Print at 127 (emphasis added).

[20] "[W]e quite properly are concerned with what the private interest groups, the negotiators, thought the terms meant when they negotiated and agreed to them. Congress's intent clearly was to embody in the Act the negotiated compromises. We must be careful not to distort the bargain reached after so many years of negotiation and compromise." *Dumas*, slip op. at 17 (discussing the work for hire compromise); *see Mills Music*, 469 U.S. at 182 n.6 (White, J., dissenting) (where legislation is the result of compromise, statements by interested parties carry some weight). Moreover, the understanding of the Copyright Office regarding work for hire was in accord with that of the parties. *See* pages 12-15, 17-20, *infra*.

Varmer then described the existing case law interpreting the work for hire doctrine under the 1909 Copyright Act. The Study noted that "*all the cases have involved salaried employees who received either a fixed salary or a minimum salary plus commission*," *id.* at 130 (emphasis added), and that in one case, a court "held that a work made by an employee as an extra assignment for extra pay was not a work made for hire." *Id.*[21] Accordingly the Study stated that "*it may be concluded that section 26 [of 1909 Act dealing with works for hire] refers only to works made by salaried employees in the regular course of their employment.*" *Id.* (emphasis added).[22]

The Varmer Study then considered and *rejected* arguments similar to those being made by petitioners and their supporting *amici* in this case. Basing its analysis on the common law distinction of employees and independent contractors, the Varmer Study concluded that independent contractors should not fall within the scope of the work for hire doctrine:

> It might be argued that the policy considerations regarding the ownership of copyright in commissioned works are in many ways similar to those with respect to works made in the course of employment. Both classes of works are produced for, pursuant to the initiative and order of, and against payment by, a person other than the creator. The differences in

[21] Citing *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 115 F. Supp. 754 (S.D.N.Y. 1953), *rev'd on other grounds*, 221 F.2d 569 (2d Cir.), *modified on other grounds*, 223 F.2d 252 (2d Cir. 1955).

[22] Varmer subsequently identified a single class of commissioned (independent contractor) works for which courts had held the work to have been made for hire—portrait photographs and paintings. *Id.* at 130. Varmer considered these cases to create a special rule for portraits that Congress "might undertake to codify." *Id.* at 143. As will be discussed below, *see* pages 19-20, *infra*, Congress considered and rejected codification of such a rule on the ground that photographers and artists deserved greater protection.

type of payment or regularity of working hours between the employment and commission situations would not seem to be crucial reasons for different treatment.

> *However, the common law generally has differentiated between the employer-employee relationship and that of the parties to a contract for a commissioned product: in broad terms, the acts of an employee as such are imputed to his employer, but those of an independent contractor are not imputed to the person for whom he performs a special commission.*

Id. at 142 (emphasis added).[23] Moreover, the Varmer Study made clear that the 1909 Copyright Act did not extend work for hire treatment to the works of independent contractors: "Perhaps in recognition of this principle, the statutory provisions in the United States regarding the employer's ownership of copyright in works made for hire, and the corresponding provisions in the copyright laws of several foreign countries, have not been extended to commissioned works generally." *Id.*[24]

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[23] Varmer explained that the underlying basis for the *common law agency* distinction between employees and contractors was the premise that an employer "*generally* gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor." *Id.* at 142 (emphasis added). Petitioners' misplaced reliance on the Varmer Report appears to stem from their failure to recognize that, considered in context, Varmer was not proposing a case-by-case definition of "employee" any different from that created by the common law of agency. Rather, Varmer was explicitly rejecting the argument that works produced by independent contractors, as they were classified under well-established common law agency concepts, should be considered works for hire.

[24] The Varmer study thus authoritatively contradicts petitioners' argument (*e.g.*, Br. at 15, 18) that the work for hire doctrine under the 1909 Copyright Act had been consistently interpreted to encompass agency-law independent contractors who had been supervised and controlled.

2. *The Register's 1961 Report.*

The Register's 1961 Report adopted Varmer's dichotomy between works by employees and works made on commission, and agreed with the Varmer Study that the work for hire doctrine did not include works made on commission. "The phrase used in the present [1909] statute—'works made for hire'—has been criticized as being inexact, because it might be thought to include works made on special commission. *The courts, however, have not generally regarded commissioned works as 'made for hire.'*" Register's 1961 Report at 86 (emphasis added). To further clarify the doctrine, the Register's Report recommended refining the definition of works for hire to include only "works created by an employee within the regular scope of his employment." [25]

3. *The 1963 Draft Bill and Comments.*

In the 1963 Preliminary Draft Bill (the "1963 Draft"), the Register maintained the clear dichotomy between works created by employees and works created by independent contractors. The 1963 Draft defined works made for hire as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission." [26]

The reaction by publishers to the 1963 Draft highlights the broad understanding that, by excluding works

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[25] *Id.* at 87. A noted commentator has argued that the intent to limit works for hire "to those created in the 'regular scope of employment,' *i.e.*, by salaried employees, could not be clearer." W. Patry, *Latman's The Copyright Law* 119 (6th ed. 1986) [hereinafter "Patry"]. Patry argues that no significance should be attached to the omission of the word "regular" from subsequent revision bills. *Id.* at 119 n.26.

[26] Copyright Office, *Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft*, § 14 at 15 n.11 (Published as Copyright Law Revision, Part 3, September 1964). The published comments on the 1963 Draft will be cited herein as "1963 Draft Comments."

made on special order or commission, the Register intended to exclude all works by independent contractors:

> • If there were any such definition [in the book publishing industry], you'd put a whole industry out of business—namely, the freelancers . . . . There would be a necessity of putting people on the payroll whom the employers wouldn't want to put on the payroll, and where the employees would prefer to work as independent contractors.[27]
>
> • In other words, a motion picture company would employ a man, and give him three months to write a script. That would be a work made on special order or commission, and therefore it would not be for hire.[28]

The written comments of the American Book Publishers Council on the 1963 Draft were even more explicit, objecting to the Draft because, under the proposal, works for hire "include only work done by a salaried employee in the scope of his regular duties, and would exclude works made on special order or commission."[29] Nowhere in the legislative history did the Copyright Office, the interested parties, or Congress advise the publishing community that their understanding of "employee," as used in the 1963 Draft, was mistaken. To the contrary, "plenty of discussion indicates that everyone involved understood the term [employee] to mean

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[27] 1963 Draft Comments at 259 (Comments of Horace S. Manges, representing the Joint Committee of the American Book Publishers Council and the American Textbook Publishers Institute).

[28] *Id.* at 258-259 (Comments of Julian T. Abeles, representing the Music Publishers' Protective Association, Inc.).

[29] *Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law*, 88th Cong., 2nd Sess. 250 (Comm. Print 1964).

someone working for an employer in a salaried job, and understood the term to exclude freelance workers completely." *Dumas*, slip op. at 15 (quoting Litman, *Copyright, Compromise and Legislative History*, 72 Cornell L. Rev. 857, 901 (1987)).

4. *The 1964 Draft Bill and Comments.*

In response to these concerns of the publishing community, the Copyright Office reversed course, proposing in the 1964 Draft Revision Bill (the "1964 Draft") that a "work made for hire" be "a work prepared by an employee within the scope of his employment, or a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire."[30] In short, under the 1964 Draft, all commissioned works could be treated as works for hire if agreed in writing. Had the Copyright Office believed the publishing community was misconstruing the phrase "employee within the scope of his employment," it would, almost certainly, have made this point prior to or in conjunction with this change in position. The Office's silence on the construction of "employee," in the face of comments that prompted an expansion of the eligibility of non-employee works to be works for hire, is strong evidence that the Office believed the publishers' comments correctly stated the scope of "employee" works.

Nor is there any evidence that the 1964 Draft intended to alter the meaning of "employee within the scope of his employment." The 1964 Draft retained the clear distinction between employee works and works prepared on

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[30] *1964 Revision Bill with Discussion and Comments*, 89th Cong., 1st Sess. 31, § 54 (Comm. Print 1965) [hereinafter "1964 Draft Bill", or "1964 Draft Comments", as applicable]. *See id.* at 144-45 for the motivation behind the change.

special order or commission that formed the basis of the earlier proposals.

The approach of the 1964 Draft Bill "drew even heavier fire [than the 1963 Draft Bill] from the representatives of authors' organizations, who argued that an author could easily be induced to sign a form contract stating that his work is 'made for hire.'" Register's Supplementary Report at 67.

5. *The 1965 Compromise.*

In April, 1965, the two sides reached a compromise that bears a close resemblance to the provision finally enacted in 1976.[31] The compromise language continued unchanged the definition of works for hire as "a work prepared by an employee within the scope of his employment." The essence of the compromise was limitation to specifically enumerated kinds of ordered or commissioned works that could, by written agreement, be converted into works for hire. *See* Register's Supplementary Report at 67. As the Register explained, "[o]ther works made on special order or commission would not come within the definition." *Id.* at 67-68. In short, within the class of works created by independent contractors, only those specifically enumerated could be considered works for hire; no others could be. *See Dumas*, slip op. at 23-24.

6. *Later Exposition of the Compromise.*

After further negotiations, the specifically enumerated class of independent contractor works included in clause 2, and thus made eligible for work for hire status, was expanded somewhat. *See* Patry at 121-22. However, the

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[31] *Dumas*, slip op. at 15, 22-24; *see* Patry at 120-21 (citing *Copyright Law Revision: Hearings on H.R. 4347 et al. Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm.*, 89th Cong., 1st Sess. 134, 148-49 (1965)).

fundamental distinction between works created by employees within the scope of their employment and works created by independent contractors on commission was retained in all subsequent versions of the bill.[32] Congress explicitly incorporated the compromise into the 1976 Act. *See* note 8, *supra*.

Nothing in the legislative history suggests that Congress intended to alter the fundamental terms of the 1965 compromise in light of subsequent judicial decisions under the 1909 Act. Indeed, subsequent developments, both immediately preceding and following passage of the 1976 Act, confirmed the limited scope of work for hire enacted in 1976.

An attempt to expand the class of commissioned works subject to a work for hire agreement to include portrait photographs and paintings[33]—and, thus, to continue an anomaly in pre-1965 judicial precedent with respect to such works[34]—was *rejected* on the recommendation of the Register of Copyrights. As the Second Supplementary Report explained in 1975:

> The addition of portraits to the list of commissioned works that can be made into "works made for hire" by agreement of the parties is difficult to justify. Artists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law, and it seems clear that, like serious composers and choreographers, they were not

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[32] "The subcommittee [in 1965] produced a chapter on copyright ownership and transfer together with a definitive legislative report that have remained unchanged and virtually unchallenged for nearly 10 years . . . ." *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm.*, 94th Cong., 1st Sess. 1889 (1975) (Testimony of B. Ringer, Register of Copyrights).

[33] *See Copyright Law Revision*, S. Rep. No. 460, 94th Cong., 1st Sess. 4 (1975).

[34] *See* note 22, *supra*.

intended to be treated as "employees" under the carefully-negotiated definition in section 101.

Second Supplementary Report, ch. XI at 12-13. No suggestion was made that portrait photographers or artists might fall within the first clause of the definition. The Register's clear intent was that the works of portrait photographers and portrait artists would not be works for hire.[35]

In 1979 Barbara Ringer, then Register of Copyrights, testified before Congress concerning certain provisions of the 1976 Act which had taken effect the previous year. The Register stated that:

> [e]ver since enactment of the new law, the Copyright Office has been receiving complaints about the policies adopted by certain publishers and producers in their dealings with *independent* authors, artists and photographers. Under the definition of "works made for hire" a person preparing a work on special order or commission can be considered an "employee for hire" *only* if the work falls into certain categories, and then only if the parties expressly agree in writing that the work shall be considered a "work made for hire". *This provision, like others in the new statute, was intended to give authors and artists greater protection than they had enjoyed under previous laws.*[36]

In short, throughout the legislative history, it was understood by the interested parties, by the Copyright Office, and by Congress, which adopted the compromise

[35] Thus, the only class of independent contractor work that had been included within the work for hire doctrine at the time of the Varmer Study, *see* note 22, *supra*, was expressly excluded under the 1976 Act.

[36] *Copyright Issues: Cable Television and Performance Rights: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm.*, 96th Cong., 1st Sess. 24 (1979) (emphasis added) [hereinafter "1979 Hearings"].

agreement, that independent authors, artists and photographers were covered exclusively by clause 2 of the definition of work for hire. Clause 1 applies to salaried or other regular agency law employees acting in the scope of their employment.

C. The Use of Agency Law Standards To Differentiate Salaried or Other Regular Employees from Independent Contractors is Mandated by Copyright Policy.

As the Register explained in her Second Supplementary Report to Congress shortly before final consideration and passage of the 1976 Act, the basic principle of U.S. copyright law is "that the individual author is the fountainhead of copyright protection." Second Supplementary Report, ch. XI at 9. More than any other class of authors, the individual author most needs the protections afforded by the Copyright Act and the incentives for creativity that form the basis for the Constitutional scheme of copyright. The work for hire doctrine embodied in the 1976 Act reflected these principles and "was intended to give authors and artists greater protection than they had enjoyed under previous laws."[37]

Petitioners now seek to rewrite the Copyright Act to strip a key subclass of individual, independent authors and artists of the protection intended and afforded by the revisions to the work for hire doctrine. In so doing, they threaten to damp the incentives intended by Congress and the Constitution. The interpretation of work for hire advanced by petitioners before this Court is contrary to the 1976 Copyright Act and core principles of copyright law.

Moreover, as the Court of Appeals in this case and the Fifth Circuit in *Easter Seal Society* correctly observed, *see* 846 F.2d at 1494; 815 F.2d at 333-34, the approach

[37] 1979 Hearings at 24.

urged by petitioners would create substantial uncertainty with respect to copyright ownership of independent contractor works. *See also Dumas*, slip op. at 30. Petitioners' approach leaves determination of the copyright status of independent contractor works to an after-the-fact judicial analysis of whether the commissioning party *actually exercised* sufficient supervision and control over the independent contractor in the performance of his commission. This analysis would require consideration of the facts and circumstances on a work-by-work basis, since the degree of supervision and control actually exercised by the commissioning party will inevitably vary from work to work.[38]

Moreover, no clear standard exists to guide the determination of how much supervision and control is enough. Petitioners urge, in effect, the creation of a new juridical class of "employee," an employee within the meaning of the Copyright Act and peculiar to it.

Contrary to Petitioners' repeated assertions, the "actual supervision and control" test advanced by petitioners was not "applied consistently by the courts under the 1909 Copyright Act." Petitioners' Br. at 15; *see id.* at 18, 20. Indeed, it was not the standard under the 1909 Act. As previously discussed, prior to 1966, it was generally concluded that the work for hire doctrine invoked well-known agency law principles in identifying "employees" for hire. Between *Brattleboro* in 1966 and the effective date of the 1976 Act, courts following *Brattleboro* required only that the work be done at the instance and expense of the commissioning party and that the commissioning party retain only the *right* to supervise

[38] *See Dumas*, slip op. at 30-31. ("*Aldon* permits the outcome of copyright disputes to vary even between the same buyer and same seller in a series of works produced together . . . . In a case such as this, for example, application of the supervision and control test could lead to different results for each of the lithographs [at issue].").

and control the independent contractor, thereby effectively eliminating the distinction between employee works and commissioned works.[39] The standard advocated by petitioners was an original creation of the Second Circuit in *Aldon Accessories Ltd. v. Spiegel, Inc.*,[40] in 1984.

Rather, as the Court of Appeals below and the Fifth Circuit in *Easter Seal Society* correctly observed, certainty in copyright transactions would be far better served by the use of traditional agency law principles in identifying employee works for hire. 846 F.2d at 1494;

[39] *See, e.g., Easter Seal Society*, 815 F.2d at 326 (citing *Brattleboro*, 369 F.2d at 565) (the court summarized a number of cases as "creating the rule that the employer is the 'author' 'whenever an employee's work is produced at the instance and expense of his employer.'"); *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir. 1978) ("The crucial element in this determination appears to be whether the work was created at the employer's insistence [sic; instance] and expense, or, in other words, whether the motivating factor in producing the work was the employer who induced its creation."); *cf. Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410, 412 (4th Cir. 1987) ("Before 1978, it mattered little, if at all, that the commissioner neither possessed nor exercised the right to direct the manner in which the work was done.").

[40] 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984); *see Dumas*, slip op. at 9 ("No circuit, in deciding copyright ownership under the 1976 Act, has continued to follow the employer-oriented approach of cases decided under the 1909 Act."). The novelty of the Second Circuit's standard itself demonstrates a fatal inconsistency in petitioners' position. Petitioners attempt to portray *Aldon Accessories* as merely carrying forward the law in existence as of the passage of the 1976 Act. Petitioners' Br. at 14-15, 20. Yet not even petitioners can argue that Congress, in passing the 1976 Act, intended to retain the "instance and expense" standard of *Brattleboro* and its progeny. *See id.* at 3-4 (urging adoption of the *Aldon Accessories* standard). As recognized by the Court of Appeals below and the Fifth Circuit in *Easter Seal Society*, continuation of the "instance and expense" standard could not have been intended, since it would effectively read out of existence the care-

815 F.2d at 335.[41] Agency law focusses on the relationship between the employer and employee, not on the employer's relationship to a particular work. Thus, the relationship can be settled prior to the creation of any particular work. Moreover, agency law uses well developed, generally understood standards. In short, it will be easier to apply and more easily understood.

Nor will the use of an agency law standard necessarily cause the copyright fractionalization feared by petitioners and certain amici. As discussed below, although the doctrine of joint works has been invoked in an attempt to circumvent the protections for individual authors embodied in the 1976 Act, proper interpretation of that doctrine, coupled with the use of written copyright assignments, will obviate concerns of fractionalization.

* * * *

In sum, the plain language, legislative history, and policies underlying the Copyright Act and the 1976 revision of the work for hire doctrine support the decision of the Court of Appeals in this case. That decision should be affirmed.

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fully negotiated clause 2 of the work for hire definition. *See* 846 F.2d at 1493-94; 815 F.2d at 331.

Once it is conceded that Congress did not intend to follow the "instance and expense" standard in the 1976 Act, it is far more logical to conclude that Congress' failure to mention *Brattleboro* demonstrates its intent to follow the understandings of the 1965 compromise than that it demonstrates an intent to create a novel, hybrid standard, peculiar to copyright law, for identifying "employees."

[41] Certainty would be even better served by limiting clause 1 to works of salaried or other regular employees. *Cf. Dumas*, slip op. at 35-37 (certainty best served by limiting "employee" to "formal, salaried employees").

II. PROPER INTERPRETATION OF THE JOINT WORK DOCTRINE IS ESSENTIAL TO PRESERVE THE PROTECTION AFFORDED INDEPENDENT CONTRACTORS BY CONGRESS.

Having concluded that the work at issue in this case was not a work made for hire, the Court of Appeals nevertheless concludes that CCNV may retain a copyright interest in the work as a joint author. 846 F.2d at 1497. A commissioned work may, in appropriate circumstances, be the joint work of the commissioning party and the independent contractor.[42] However, it is essential that the doctrine be properly interpreted lest the protection intended and afforded to independent contractors by the 1976 Act under the work for hire doctrine be circumvented.

Petitioners, in their effort to raise the specter of copyright "fractionalization," suggest that the authorship standard for joint works has been established and may be met by a very small contribution to the work—"the contribution [to a joint work] is not required to be copyrightable itself."[43] In fact, such a standard is neither established, nor consistent with law or common sense.

At minimum, joint authors must be *authors* within the meaning of the Copyright Act. *See* 17 U.S.C. § 101 ("A 'joint work' is a work prepared by two or more authors. . . ."). Further, extending authorship status to one who contributed only the idea of a work and not expression would run directly counter to the rule that copyright protects only expression and not ideas. *Id.* § 102(b). Thus, courts have regularly rejected joint authorship claims by commissioning parties who provided

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[42] PPA takes no position on whether, under the facts in this case, the work at issue is properly considered a joint work.

[43] Petitioners' Br. at 31 (citing 1 M. Nimmer, *Nimmer on Copyright*, § 6.07 at 6-18).

information necessary to define the scope of the project or who specified desired design features.[44]

The Ninth Circuit, commenting on the application of the joint authorship doctrine to commissioned works, recently stated that a commissioned work might be a joint work "where the commissioning party provides *significant creative input.*" *Dumas*, slip op. at 38 (emphasis added). And, as one commentator has stated, "a putative joint author must make some genuine contribution to the work's creation." Patry at 116.

The potential for abuse of the joint authorship doctrine is starkly demonstrated in several cases PPA is currently litigating against photofinishers who have been duplicating copyrighted portrait photographs without the photographers' authorization. Several photofinishers have argued that their conduct is not infringing on the ground that, in their view, the commissioning party or subject, who does little more than present him or herself for photographing, identifies other subjects of the picture, and, in certain cases, selects clothing and suggests a pose,

[44] *See, e.g., Whelan Assocs. Inc. v. Jaslow Dental Laboratory, Inc.*, 609 F. Supp. 1307, 1318 (E.D. Pa. 1985), *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) (rejecting joint authorship claim relating to computer program by party who sought out programmer, defined task, described business and provided some assistance: "[t]he information and advice which Rand Jaslow provided was little more than one would expect from the operator of any business who seeks to have a computer system designed for him."); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 259 (D. Neb. 1982) (rejecting building owner's claim of joint ownership in architectural plans: "[i]n this relationship, it is quite normal for the client to supply the engineer or architect with general design features which the client expects to be incorporated into architectural plans and for the professional then to create the design drawings incorporating those features."); *Meltzer v. Zoller*, 520 F. Supp. 847, 857 (D.N.J. 1981) (rejecting claim for joint authoriship of architectural plans by owner who provided initial "thumbnail" sketches, contributed ideas, defined needs, made changes and exercised approval power.).

is a joint author of the photograph, and therefore joint owner of the copyright with the photographer.[45] Were this contention upheld, it would vitiate the protection afforded portrait photographers by the 1976 Act. *See* pages 19-20, *supra*.

Moreover, it would skew the incentive structure intended by the Constitution and enacted by Congress. A subject does not require the protection of copyright to appear for a portrait. The photographer does require that protection to produce the portrait.

The only courts to rule on claims that a portrait subject is a joint author have rejected this joint authorship claim.[46] However, the mere fact that it is being raised, demonstrates that the doctrine must be properly interpreted and integrated with the language, purpose and policy of the statutory provisions governing work for hire.

In order to be a joint author, a commissioning party must make a substantial creative contribution to the work. This contribution must be of a kind that itself is entitled to copyright protection.

[45] *See, e.g., Olan Mills, Inc. v. Eckerd Drugs of Texas, Inc.*, No. 3-88-0333-D (N.D. Tex. 1988), *reported in* Pat. Trademark & Copyright J. (BNA), Vol. 37 at 246 (Jan. 12, 1989); *Professional Photographers of Am., Inc. v. 1240 Camera Co.*, No. 3-88-2739-D (N.D. Tex. 1988).

[46] *See Olan Mills, Inc. v. Eckerd Drugs of Texas, Inc.*, No. 3-88-0333-D (N.D. Tex. 1988) (memorandum opinion accompanying order granting preliminary injunction) (in which PPA is a party plaintiff), *reported in* Pat. Trademark & Copyright J. (BNA), Vol. 37 at 246 (Jan. 12, 1989); *Childers v. High Society Magazine*, 561 F. Supp. 1374, 1375 n.2 (S.D.N.Y. 1983).

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed. In order to prevent the circumvention of the work for hire doctrine, this Court should make clear that a substantial, copyrightable contribution is necessary for a commissioning party to be a joint author of a work produced by an independent contractor.

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OCTOBER TERM, 1988

Community for Creative Non-Violence, et al.
Petitioners,

-against-

James Earl Reid
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTEREST OF THE AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

The American Intellectual Property Law Association, Inc. ("AIPLA") is a national bar association of more than 5400 members who are admitted to the bars of many of the different states and are engaged in the practice of copyright, patent, trademark, licensing, trade secret, and other laws protecting intellectual property rights. The AIPLA membership includes attorneys in private, corporate, and government practice; lawyers associated with universities and small and large businesses; and lawyers active in both the domestic and international transfer of technology and licensing.

The AIPLA has no views on the private interests of the parties to this action, but is deeply concerned about an issue of public importance relating to the decision of the United States Court of Appeals for the District of Columbia from which review is sought. The sole interest of the AIPLA here is to promote clarity, certainty, and uniformity in the law of copyright, which will benefit members of the bar, the judiciary, and, most importantly, the public.

The AIPLA believes that creators of copyrightable works as well as the copyright system itself will best be served if the decision below of the District of Columbia Circuit is affirmed so that all interested parties who create or use copyrighted works can resolve issues of authorship and ownership of copyright in such works fairly and with certainty.

SUMMARY OF THE ARGUMENT

Article I, § 8 of the Constitution empowers Congress to enact laws to

> promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . .

Pursuant to that power, Congress enacted the Copyright Act of 1976, 17 U.S.C. §§ 101 et seq. (1982) (the "1976 Act").

In order to be the subject matter of copyright under the 1976 Act, a work must be original, a work of "authorship", and must be fixed in a tangible medium of expression. 17 U.S.C. § 102. Ownership of copyright in a work vests initially in the author or authors of the work. 17 U.S.C. § 201. The statute does not define "author" or "authorship" but this Court has defined an "author" in the Constitutional sense as "[h]e to whom anything owes its origin; originator; maker; one who completes a work of science or literature." *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).

The law creates a fiction of sorts in section 201(b) by providing that

> [i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title . . .

A "work made for hire" is specifically defined in section 101 of the 1976 Act as including two separate categories of works: a work prepared by an employee within the scope of his or her employment and, under certain prescribed circumstances, a work specially ordered or commissioned.[1] The 1976 Act fails to define "employee" and "employer." Because the statute itself provides no definitional assistance as to the appropriate indicia of an employer-employee relationship, one must refer to the legislative history to obtain such guidance.

The legislative history of the 1976 Act is thoroughly reviewed and analyzed in *Dumas v. Gommerman*, No. 87-6542 (9th Cir. January 13, 1989). As discussed there, during the debates that led up to the 1976 Act, interested parties came to a compromise in 1965 that resulted in the definition of "work made for hire" presently found in 17 U.S.C. § 101. *Dumas*, slip op. at 15. Briefly, the compromise was that authors would be granted termination rights in return for which publishers were accorded the status of "author" in only two situations. First, for works created by "employees" in the scope of their employment; second, for specifically enumerated categories of works created on commission when the parties agree that the work is to one made for hire. *Id.*, slip op. at 21-22. It was understood by all parties to the compromise that "em-

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[1] 17 U.S.C. § 101 of the 1976 Act defines a "work made for hire" as:

> (1) a work prepared by an employee within the scope of his or her employment; or
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> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. . .

ployee" was to be limited to "regular, salaried" employees. *Id.*, slip op. at 19.[2]

A decision that a section 101 "employee" is a regular, salaried employee would affirm a regime of copyright authorship and ownership that is eminently fair, workable, and predictable. If the *Dumas* decision is followed, section 101 and 201 of the 1976 Act can be applied prior to the creation of the copyrighted work and at a time when, if necessary, the assignment of rights can be negotiated. If the person creating the work is a regular, salaried employee, and the work is prepared within the scope of his or her employment, ownership of the copyright in the work generally can be determined prior to the creation of the work because the employer is considered the "author" of the work under section 201(b).

If the person is not a regular, salaried employee, but is an independent contractor, then the second subdivision of the definition of "work made for hire" of section 101 may apply. If the work prepared by the independent contractor is one of the nine enumerated types and the parties expressly agree in writing that the work is to be considered as a work for hire, then the work will be a work made for hire. This is true because, under section 201(b), the "person for whom the work was prepared is considered the author . . .", and therefore the owner of the work is the person who hired the independent contractor.

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[2] While *Dumas* does hold that an "employee" under the first subdivision of section 101 is a "regular, salaried" employee, it does recognize that there may be ambiguous relationships and allows that relevant factors may be looked to to determine if the relationship is one of regular, salaried employment. *Dumas*, slip op. at 37-38.

The last possibility is that the person preparing a work is not a regular, salaried employee and either (1) the work is not one of those enumerated in part two of the definition or (2) the work is an enumerated work, but there is no written agreement between the parties to consider the work one created for hire. In such a case, the person to whom the work owes its origin is and remains the author. Under those circumstances, ownership of the work can be transferred by virtue of section 201(d) to the person who commissioned the author to prepare the work.

In the present case, the Community for Creative Non-Violence ("CCNV") commissioned James Earl Reid ("Reid") to prepare a work - a sculpture of three human figures and a shopping cart - entitled "Third World America." Reid was neither a regular, salaried employee of CCNV, nor was the work included in one of the categories of works enumerated in part two of the section 101 definition of "work made for hire." There was, moreover, no agreement, written or otherwise, concerning the status of the work as one made for hire. The court below was correct, therefore, in deciding that under such circumstances, CCNV was not an "author" by virtue of the "work for hire" provisions of the 1976 Act. The court partly erred, however, in its rationale for that decision. By injecting principles of agency law into a determination of whether a work created on special order or commission can be treated as the work of an "employee" within the first subdivision of section 101, the court upset the structure of the 1976 Act. We believe that the decision of the Ninth Circuit in *Dumas* represents the correct construction of the 1976 Act.

ARGUMENT

I. THE HOLDING BELOW IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE 1976 ACT

The legislative history of the 1976 Act relating to the "work for hire" doctrine can only be understood in the context of the Copyright Act of 1909, 17 U.S.C. §§ 1, et seq. (repealed 1976) (the "1909 Act") and the cases interpreting it. Once the parallel evolution of the legislative history of the 1976 Act and the judicial history of the 1909 Act are set side-by-side, it is clear that Congress intended an "employee" under section 101 of the 1976 Act to be a regular, salaried employee.

A. Case Law Developments Prior To 1966 Demonstrate "Work For Hire" Provisions of the 1909 Act Only Included Salaried Employees

The 1909 Act, the precursor to the present 1976 Act, provided in section 26 that "the word 'author' shall include an employer in the case of works made for hire." The 1909 Act did not further define "works made for hire." As of 1960, it was understood, however, that

> [t]he statutory concept of employment for hire is based on the specific contractual relationship between employer and employee. The courts have not given a definition of that relationship which will cover all situations that may come up, but all the cases have involved salaried employees who received either a fixed salary or a minimum salary plus commission. . . *Hence, it may be concluded that section 26 refers only to works made by salaried employees in the regular course of their employment.*

B. Varmer, *Works Made for Hire and on Commission*, Studies Prepared for the Copyright Office, Reprinted by the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. 127, 130 (Comm. Print 1960)(emphasis added)("Varmer Study").

Early cases involving the status of specially ordered or commissioned works under the 1909 Act prior to 1966 often involved the ownership of copyright in photographs. These cases did not hold that the sitter was the "employer" of the photographer and, therefore, "author" of the work. Instead, they merely stated a presumption, based on the common law, that where a person commissions a photograph to be taken, the commissioning party is entitled to rights in the photograph at least as between that person and the photographer. The possibility was left open that as between the photographer and third parties the photographer would own the rights. *See, e.g., Lumiere v. Pathe Exch.*, 275 F. 428 (2d Cir. 1921); *Lumiere v. Robertson-Cole Distrib. Corp.*, 280 F. 550 (2d Cir.), *cert. denied*, 259 U.S. 583 (1922).

The common law was synthesized in *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 31 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940), where the court stated:

> If [an artist] is solicited by a patron to execute a commission for pay, the presumption should be indulged that the patron desires to control the publication of copies and that the artist consents that he may, unless by the terms of the contract, express or implicit, the artist has reserved the copyright

> to himself. Such a presumption must rest on the supposed intention of the parties. . .

Thus, as of the date of the decision in the *Yardley* case, courts limited the applicability of section 26 of the 1909 Act to works prepared by regular, salaried employees in the regular course of their employment. Works created on commission were not treated as works for hire, but it was "presumed that the copyrights were *assigned* to the patron under the commission contract; there was nothing in them about 'work for hire.'" *Easter Seal Soc., Inc. v. Playboy Enters.*, 815 F.2d 323, 325 (5th Cir. 1987), *cert. denied*, ___U.S. ___ , 108 S.Ct. 1280 (1988)(emphasis in original).

B. The Legislative History of the 1976 Act

The "work for hire" doctrine was a major issue of discussion and debate during the lengthy revision process of the 1909 Act.[3]

At the outset of the revision process in 1961, the Register of Copyrights proposed that copyright ownership, but not authorship, of works created by employees within the scope of their employment vest automatically in the employer.[4] Such a result, however, was not acceptable to publishers because they believed that being considered an "owner" rather than an "author" of a work would adversely affect their rights in foreign jurisdictions.[5]

[3] "The status of works prepared on special order or commission was a major issue in the development of the definition of 'works made for hire' in section 101, which has undergone extensive revision during the legislative process." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., p. 121 (1976). An excellent review of the legislative history of the "work for hire" provisions of the 1976 Act is found in Patry, W.F., *Latman's the Copyright Law*, 117-125 (6th Ed. 1986).

[4] *See*, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. 87 (Comm. Print 1961).

The Register of Copyrights accepted these concerns and in the preliminary draft of the Copyright Law presented to Congress by the Copyright Office on July 14, 1964, provided in section 14(b) that "[i]n the case of a work made for hire, the employer shall . . . be considered the author. . ." Copyright Law Revision Part 3, Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft, 15, September, 1964 ("Copyright Law Revision Part 3"). A footnote to section 14(b) of the Draft Act defined a "work made for hire" as a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission." Copyright Law Revision Part 3 at 15.

Although the debate continued through the legislative process as to whether works made on special order or commission should be included in the definition of work made for hire and if so, which works and on what terms, there was never any doubt expressed by the participants in the process of revising the U.S. Copyright Law as to the definition of "employee."[6] For example, the representative of the

[5] *See, Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1490, n.7 (D.C. Cir.), *cert. granted*, ___U.S. ___ , 109 S.Ct. 362 (1988).

[6] Statements made by participants in the process of revising the U.S. Copyright Law are highly relevant here because "[m]uch of the [1976] Act can be seen as a virtual contract between

American Book Publishers Council recast the proposed definition of "works made for hire" in the following terms:

> "[W]orks for hire" - in which copyright is by law owned by the employer - would be redefined to include only work done by a salaried employee in the scope of his regular duties and would exclude works made on special order or commission.

Statement submitted by the American Book Publishers Council to the Register of Copyrights in November 1963, reprinted in Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law, 88th Cong., 2d Sess. 250 (Comm. Print 1964)("Copyright Law Revision Part 4")[7]

creators and marketers of copyrighted materials. Many of the [1976] Act's provisions have considerable impact on these two interest groups without any broader effect beyond. The work for hire provisions are in this mold. In interpreting them, we quite properly are concerned with what the private interest groups, the negotiators, thought the terms meant when they negotiated and agreed to them. Congress's intent clearly was to embody in the [1976] Act the negotiated compromises. We must be careful not to distort the bargain reached after so many years of negotiation and compromise." *Dumas*, slip op. at 16-17.

[7] *See also*, comments of Julian T. Abeles, representing Music Publishers' Protective Association, Inc.: "[A] motion picture company would employ a man, and give him three months to write a script. That would be a work made on special order or commission, and therefore it would not be for hire." Part 4, p. 259, and comments of E. Gabriel Perle, representing Time, Inc.: "Where you get an outside entity and you ask them to create a work for hire, and it's the express intention of all the parties

As explained earlier in section I.A., this understanding as to the proper definition of the term "employee" was, prior to the decision in *Brattleboro Publishing Co. v. Winmill Publishing Co.*, 369 F.2d 565 (2d Cir. 1966), entirely consistent with the definition established by the courts construing section 26 of the 1909 Act.[8]

Having agreed to a definition of the term "employee" in the "work for hire" provisions, the publishers then endeavored to expand the definition of "work made for hire" to include commissioned works. For example, The American Book Publishers Council, Inc. and the American Textbook Publishers Institute proposed that a "work made for hire" be defined as:

> (a) a work created by an employee within the scope of his employment; [or]
>
> (b) a work created on special order or commission if the parties so agree in writing.

Copyright Law Revision Part 4 at 274.

This approach was adopted by the National Audio-Visual Association, Inc., Copyright Law Revision Part 4 at 397, and was included in the 1964 bill. The Authors League of America, Inc. took strong exception to this approach arguing that authors "do not

that that work product be the exclusive product of the commissioner or the orderer, their comptrollers and accountants start going into a real tailspin the minute they start seeing the word "employee," because this means social security, withholding, and all the other attendant mechanical housekeeping tasks." Copyright Law Revision Part 4 at 267.

[8] "[S]ection 26 refers only to works made by salaried employees in the regular course of their employment." Varmer Study at 130.

have the economic bargaining power to resist the inclusion of such a clause in publishing contracts." Copyright Law Revision Part 4 at 313. The Authors League of America, Inc. then went on to hint at a possible compromise by asserting that

> [t]he needs of publishers of truly composite works, such as dictionaries and reference books, can be solved without interfering with the protection of an adequate renewal, or reversion clause, which is so much needed by American authors.

Copyright Law Revision Part 4 at 314.

In an effort to reconcile the differences between authors and publishers, the Copyright Office brokered a compromise between the parties. This compromise was adopted in the proposed 1965 draft copyright bill.[9] Under the compromise, only a limited number of enumerated types of works would be accorded status as a "work made for hire", and then only if the parties expressly agreed in writing that the work would be considered a "work made for hire."[10] The

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[9] Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 66-67 (Comm. Print 1965). ("Copyright Law Revision Part 6")

[10] The definition of the "work made for hire" in the 1965 draft bill reads as follows:

(1) a work prepared by an employee within the scope of his employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for hire.

parties testified before Congress in 1965 and clearly set forth the terms of the compromise.[11] The next year, in the first legislative report on the revision, the House Judiciary Committee adopted the compromise. H.R. Rep. No. 2237, 89th Cong., 2d Sess., 114-116 (1966).[12]

The four groups of works enumerated in subsection two of the 1965 draft bill were later expanded to the present nine in section 101 of the 1976 Act. In substance, however, the definition of "work made for hire" and the sharp distinction between works created by employees and works specially ordered or commissioned remained unchanged from 1965 to its inclusion in Section 101 of the 1976 Act.

It was the definition of "employee" as a regular, salaried employee that formed the basis for the compromise on the "work for hire" provisions of the 1976 Act.[13] Moreover, it was this compromise, and hence

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[11] *See*, Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835. Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm., 89th Cong., 1st Sess. 107 (1965). *See also*, *Dumas*, slip. op. at 22-23

[12] The language in this report was adopted virtually verbatim in the 1976 House Report. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976).

[13] It is critical to note the relative timing of the compromise worked out between authors and publishers on the "work for hire" issues raised in the 1976 Act and parallel judicial developments in the construction of section 26 of the 1909 Act. Specifically, the compromise between authors and publishers was reached prior to the Court of Appeals for the Second Circuit's decision in *Brattleboro* under the 1909 Act. Thus, at the time that the critical compromise was made in 1965 that led to the

the definition of an "employee" as a regular, salaried employee, that was approved by all interested parties to the revision of the U.S. Copyright Law. The definition of an "employee" as a regular, salaried employee was a pillar upon which the compromise was built and any attempt to undermine it would nullify the compromise.

C. The Evolution of the "Work for Hire" Doctrine Under the 1909 Act After 1966

In December of 1966, the Second Circuit held, for the first time, that the "work for hire" principles of section 26 of the 1909 Act were "applicable when the parties bear the relationship of employer and independent contractor." *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 568 (2d Cir. 1966). After *Brattleboro*, expansion of the "work for hire" doctrine proceeded apace. *See, Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974) ("[The 'work for hire'] doctrine is applicable only when the employee's work is produced at the instance and expense of the employer. . ."); *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir. 1978) ("The crucial element in this determination [of whether a work was created by an employee within the scope of employment] appears to be whether the work was created at the employer's insistence and expense. . . Another factor is whether the employer had the *right* to direct and supervise the manner in which the work was being performed."). Given this state of the law under the 1909 Act, the Fifth Circuit more recently observed that the "work for hire" doctrine "developed into an almost irrebuttable presumption that any person who paid another to create a copyrightable work was the statutory 'author' under the 'work for hire doctrine.'" *Easter Seal Society*, 815 F.2d at 327.

definition in the 1976 Act, an "employee" under section 26 of the 1909 Act was understood by all interested parties to mean a regular, salaried employee.

The legislative history of the 1976 Act can only be understood if it is set along side the pre- and post-1966 cases which construed section 26 of the 1909 Act. As indicated above in section I.B., the compromise on the "work for hire" provisions in the 1976 Act was reached in 1965, at a time when the term "employee" under section 26 of the 1909 Act was judicially construed as being a regular, salaried employee. Since the compromise was reached before the *Brattleboro* decision in 1966, the overly expansive judicial construction of the term "employee" under section 26 of the 1909 Act by *Brattleboro* and its progeny is irrelevant to the legislative history of the "work for hire" provisions of the 1976 Act. This is especially true when it is realized that once the compromise was reached in 1965 it was not thereafter reviewed or considered by Congress until passage of the Act. *Dumas*, slip op. at 24, n.14. In that context, it is clear that Congress intended the term "employee", as used in section 101 of the 1976 Act, to mean a regular, salaried employee.

II. THE APPROACH URGED BY CCNV IS UNWORKABLE

In their Brief, Petitioners urge this Court to focus on "actual supervision and control" to determine if one is an "employee" under 17 U.S.C. § 101. Brief for Petitioners, pp. 18-24 and 30-35. This approach was adopted in *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984). In *Aldon*, the court, citing *Brattleboro* and the

cases following *Brattleboro*, approved the district court's instruction that an employee working within the scope of his employment under 17 U.S.C. § 101, is "a person acting under the direction and supervision of the hiring author, at the hiring author's instance and expense." *Aldon*, 738 F.2d at 551.

This "actual supervision and control" test is subject to criticism on at least two grounds. First, an "actual supervision and control" test is simply not sufficient to distinguish between independent contractors and employees. This deficiency was recognized by the Fifth Circuit in *Easter Seal Society*:

> "Actual control" or the "right to control" are relevant, but alone they cannot make an otherwise independent contractor into an employee. Conversely, the lack of actual control over the production of a given work—and perhaps even the *right* to control production—will not make an independent contractor out of an employee.

Easter Seal Society, 815 F.2d at 335-336 (footnote omitted).

Apparently, this clearly undesirable result is what drove the Court in *Evans Newton Incorporated v. Chicago Systems Software*, 793 F.2d 889, 894 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986) to hold that the work at issue was a "work for hire", absent any evidence that the "employer" actually controlled the work of the putative "employee". This holding was recognized for what it was by the Fifth Circuit as a gradual

> slide into a "right to control" test, just as in the old "work for hire" doctrine the "right to control" test from agency law gradually slid into an almost absolute (though frequently false) presumption that whoever paid for creation of the work had the "right" to control its production.

Easter Seal Society, 815 F.2d at 334.

We note in this regard that the so-called "literal interpretation" urged by the court below and by the Fifth Circuit in *Easter Seal Society* calls for adoption of the Restatement of Agency[14] to determine if one

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[14] Both the Court below and the Fifth Circuit in *Easter Seal Society* applied section 220 of the Restatement of Agency (second) (1958) which reads as follows:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing

is or is not an "agent" or "employee". As recognized by the Ninth Circuit in *Dumas*, however, "in adopting agency law principles to distinguish employees from independent contractors, the Fifth Circuit indirectly includes the rejected 'supervision and control' test, because agency law considers relevant 'the extent of control which, by the agreement, the master may exercise over the details of the work.' " *Dumas*, slip op. at 35. We agree with *Dumas* in this regard. Further, we agree with *Dumas* that a relationship between parties may be ambiguous, in which case relevant factors may be looked to in order to determine if the relationship is one of regular, salaried employment. *Dumas*, slip op. at 37. In all such cases, however, caution must be exercised to be sure that the indicia do not overshadow the basic inquiry of whether the creator of a work is a regular, salaried employee.[15]

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the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

[15] In this regard we note that the Ninth Circuit stated that "[w]hile the degree of control and input exercised by the buyer may be relevant to an inquiry into joint authorship . . . it will not ordinarily be relevant in determining the status of the artist [as an employee] . . ." *Dumas*, slip op. at 38 (footnote omitted). It was apparently recognized by the court in *Dumas* that looking

Another problem with *Aldon*'s "actual control" test is its superimposition of an additional inquiry, not mandated by the language of section 101, which adds complexity and uncertainty to the Act. Rather than simply making a reasoned, prospective judgment whether an individual is a regular, salaried employee, and thus a section 101 "employee", one must look to the nature and extent of the contributions made to the work. Thus, under *Aldon*, which is the approach urged by CCNV, one must examine each work after it is completed and judge whether the commissioning party exercised the requisite degree of control to be considered an employer under sections 101 and 201 of the 1976 Act. Increased litigation seems likely because there is no objective standard of control which can be looked to by the parties or by the bar to determine the degree of control required to establish an employer/employee relationship under the 1976 Act.

If, however, one first determines whether the person creating a work is a regular, salaried employee, all works created by that individual as an employee within the scope of employment are "works made for hire." If the person is not an employee, or if there is doubt, a contract can be negotiated to prospectively establish ownership of copyright.[16]

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to "right to control" or "actual control" as indicia of a "regular, salaried employee" would dilute the clear definition of a section 101 "employee" as a "regular, salaried employee", obfuscate the clear differentiation between the first and second subdivisions of the section 101 definition of "work made for hire", and ultimately subvert the compromise worked out by the interested parties and endorsed by Congress.

[16] Ownership is, of course, transferable under 17 U.S.C. §

This result has the singular benefit of being consistent with the literal meaning of 17 U.S.C. §§ 101 and 201, being consistent with the legislative history of 17 U.S.C. §§ 101 and 201, and producing a construction of 17 U.S.C. §§ 101 and 201 that is fair, workable and predictable.

Turning to the case at bar, Reid was not an employee of CCNV within the meaning of the section 101 definition of "work made for hire" because he was not a regular, salaried employee. Reid's status as an independent contractor is evidenced by: (1) the length of his employment was short - spanning from October, 1985 to December 24, 1985. *Community for Creative Non-Violence*, 846 F.2d at 1487-1488; (2) payment was not on a salary basis but was, rather, by the job for a fixed sum of $15,000. *Id.*, at 1487; and (3) Reid had not done work for CCNV before or after the sculpting of "Third World America."

We submit, therefore, that Reid's work was a commissioned work under any meaning of that term. Petitioners attempt to characterize a clearly commissioned work as the work of an "employee" is an attempt to create a remedy to conform to a desired result. The result Petitioners desire is utterly destructive of the careful compromise on the "work for hire" provisions of the 1976 Act negotiated by the interested parties and endorsed by Congress. That com-

201(d). We submit that this is the fairest result in that it places "the burden of contracting, i.e., deviating by contract from the statutory rule, . . . on the shoulders of the party who is ordinarily in a better position to carry this burden. This party would seem to be the employer, by reason of his stronger bargaining position and more convenient recourse to expert legal advice." Varmer Study at 140.

promise should not be upset merely because CCNV failed to take the steps necessary to obtain the rights to the work "Third World America" it now claims it needs.

CONCLUSION

We urge this Court to hold that the 17 U.S.C. § 101 definition of "work made for hire" establishes a clear division between its first and second subsections whereby the first subsection applies only to regular, salaried employee and the second subsection applies only to the enumerated categories of specially commissioned works and only if the parties agree in writing that the work is to be considered a work made for hire.

This result is consistent with the legislative history and produces a result that was agreed to by the interested parties during drafting of the 1976 Act and which is fair and workable.

Respectfully submitted.

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OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.,
PETITIONERS

v.

JAMES EARL REID

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE REGISTER OF COPYRIGHTS AS AMICUS CURIAE SUPPORTING RESPONDENT

WILLIAM C. BRYSON
Acting Solicitor General
THOMAS W. MERRILL
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QUESTION PRESENTED

Whether under the "work made for hire" provisions of the Copyright Act of 1976, 17 U.S.C. 101 and 201(b), petitioners own the copyright in a statue made by respondent at petitioners' request and expense and under petitioners' supervision and control.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-293

COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL., PETITIONERS

v.

JAMES EARL REID

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE REGISTER OF COPYRIGHTS AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE AMICUS CURIAE

This case presents an important and recurring question concerning the meaning and application of the "work made for hire" provisions of the Copyright Act of 1976, 17 U.S.C. 101 *et seq.* The Copyright Office, a branch of the Library of Congress, is generally responsible for discharging "[a]ll administrative functions and duties" under the Copyright Act (17 U.S.C. 701(a)). The Copyright Office took a principal role in drafting the work-made-for-hire provisions – including, as this Court recognized more generally in *Mills Music, Inc.* v. *Snyder,* 469 U.S. 153, 159-160 (1985), "authorizing * * * studies"; "conduct[ing] numerous meetings with representatives of the many parties that the copyright law affected"; "issu[ing] a preliminary draft revision bill"; "submitt[ing] [a] 1965 draft revision bill"; and "prepar[ing] a supplementary report to accompany the 1965 draft revision bill." In addition, pursuant to 17 U.S.C. 105, "work[s] of the United States Government" are treated, for copyright purposes, in the same way as "works made for hire" under 17 U.S.C. 101. See H.R. Rep. No. 1476,

94th Cong., 2d Sess. 58 (1976). The United States therefore has a direct programmatic interest in the construction of the work-made-for-hire provisions. Finally, this Court has previously invited the Solicitor General to express the views of the United States in *Easter Seal Society For Crippled Children & Adults of Louisiana, Inc.* v. *Playboy Enterprises, Inc.*, 815 F.2d 323 (5th Cir. 1987), cert. denied, No. 87-482 (Mar. 28, 1988), a case that raised the same legal issue as this case.

STATEMENT

A. The Statutory Framework

Under the Copyright Act of 1976 (the Act), 17 U.S.C. 101 *et seq.*, the copyright in a work "vests initially in the author or authors of the work" (17 U.S.C. 201(a)). In the case of so-called "works made for hire," "the employer or other person for whom the work was prepared is considered the author" and, "unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright" (17 U.S.C. 201(b)).

The Act defines two categories of works that constitute "works made for hire" (17 U.S.C. 101). One category, defined in Subsection (1), includes works "prepared by an employee within the scope of his or her employment."[1] The other, defined in Subsection (2), includes works "specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

B. The Present Controversy

1. Petitioner Community for Creative Non-Violence (CCNV) is a Washington, D.C.-based non-profit association

[1] The Copyright Act contains no definition of the terms "employee" or "scope of employment." 1 M. Nimmer, *Nimmer on Copyright* § 5.03[B][1], at 5-12 (1987).

devoted to the welfare of homeless persons. In the fall of 1985, CCNV decided to participate in the annual Christmas Pageant of Peace in D.C. by sponsoring a display that would dramatize the plight of the homeless. CCNV, together with its agent and trustee Mitch Snyder, also a petitioner, conceived the idea for a modern Nativity scene which would depict, in place of the traditional Holy Family, a homeless family huddled atop a city steam grate. The family was to be black; the figures were to be life-sized; and the steam grate was to be placed atop a pedestal containing special effects equipment that would emit artificial steam to swirl about the figures. CCNV also designated the name "Third World America" for the work, and settled upon a legend for the pedestal—"and still there is no room at the inn." Pet. App. 3a.

Synder contacted respondent, James Earl Reid, a Baltimore sculptor, whom Snyder had never met before. In the course of two telephone calls in October 1985, the two men reached an agreement. Respondent promised to sculpt the three human figures for "Third World America" and a shopping cart for their belongings; he also agreed to use a synthetic substance called "Design Cast 62" that could be tinted to resemble bronze. CCNV assumed responsibility for the steam grate and the pedestal. For a total outlay of approximately $7,000-$8,000, CCNV engaged a cabinet maker to construct the pedestal, obtained the special effects equipment, and acquired the chemicals to produce the simulated steam. The parties agreed that respondent's portion of the sculpture would cost no more than $15,000, not counting respondent's own services, which he donated to the project. Respondent agreed to deliver the work by December 12 for attachment to the base. Neither party mentioned copyright. Pet. App. 3a-4a; 2/2/87 Tr. 36-37, 141.

Respondent and his assistants worked on the figures throughout November and December, conferring periodically with CCNV and making changes to accommodate petitioners' requests. On December 24, 1985, respondent delivered his portion of "Third World America" to the District of Columbia, where it was joined to the steam grate pedestal and placed on display near the site of the Pageant. At that time, respondent

received $3,000 from Snyder, the final installment of the $15,000 total payment due him under the agreement. Pet. App. 4a.

In late January 1986, CCNV sent the entire sculpture to respondent so that he could repair damage to the foot of the male figure. The following month, CCNV began making plans to take the sculpture on a tour of several cities to raise money for the homeless. Respondent objected to the proposed tour, contending that the Design Cast 62 material was too delicate to withstand the trip. He urged CCNV to cast the sculpture in bronze or to have a "master mold" made. CCNV refused, but invited respondent to do so at his own expense. Pet. App. 4a.

In March 1986 CCNV asked respondent to return the sculpture. Respondent refused. Instead, respondent filed an application for copyright registration for "Third World America" in his own name on March 20, 1986, and announced his own plans to take the sculpture on an exhibition tour that was less ambitious than the one proposed by petitioners. Snyder filed a competing application for copyright registration in his name on May 21, 1986. Pet. App. 4a-5a.

2. On June 2, 1986, petitioners commenced this litigation against respondent, seeking return of the sculpture and a determination of copyright ownership. Pet. App. 5a. The district court entered judgment in favor of petitioners (*id.* at 29a-36a). The court concluded that the sculpture was a "work made for hire" pursuant to Subsection (1) of the definition in 17 U.S.C. 101, which applies to works "prepared by an employee within the scope of his or her employment." The court reasoned that "for statutory copyright purposes generally, the employment relationship giving rise to a copyright is somewhat more expansive than the master-servant relationship found in the common law of agency" (*id.* at 34a-35a). In particular, the court held, "[i]f the putative 'employer' was either the 'motivating factor' in the production of the work, or possessed the right to 'direct and supervise' the manner in which the work was done, the copyright is his no matter the degree of creative license actually exercised by the artist-employee" (*id.* at 35a). On this record, the court concluded, "[i]t is indisputable * * * that [petitioners

were] the motivating factor in the procreation of 'Third World America.' " (*ibid.*).

3. The court of appeals reversed (Pet. App. 1a-28a). Relying on the Fifth Circuit's decision in *Easter Seal Society for Crippled Children & Adults of Louisiana, Inc.* v. *Playboy Enterprises, Inc.*, 815 F.2d 323 (1987), cert. denied, No. 87-482 (Mar. 28, 1988), the court of appeals stated that Section 101 creates "a simple dichotomy * * * between employees and independent contractors" (Pet. App. 13a (citation omitted)). In particular, the court explained, Subsection (1) applies whenever the creator of the work is an employee, as defined by principles of agency law; Subsection (2), the court continued, applies whenever, under agency principles, the work's creator is an independent contractor. Thus, the court held (Pet. App. 19a (emphasis in the original)), if a work is created by an independent contractor, it is governed by Subsection (2) and therefore cannot be a work made for hire unless it "falls within one of the specific categories enumerated in [Section] 101(2) *and* 'the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.' " Applying that approach, the court of appeals held that "Third World America" was not a work made for hire. It explained that respondent "was an independent contractor and not an employee of CCNV within the rules of agency law" (Pet. App. 19a).[2] The court accordingly held that Subsection (2) applied; and under that provision, the court concluded, "sculpture surely is not a category of commissioned work enumerated" and "no written agreement existed between [petitioner] and [respondent]."[3]

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[2] In this connection, the court of appeals noted (Pet. App. 19a n.11) that respondent had "donated his services, worked in his own studio, and personally engaged assistants when he needed them." Moreover, the court observed (*ibid.*), "[c]reating sculptures was hardly 'regular business' for CCNV."

[3] The court remanded the case for a determination whether petitioners and respondent may be "joint authors" of the copyright in the sculpture, as well as for a determination whether other persons who had assisted in the project might likewise have a claim of joint authorship in the copyright. Pet. App.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, defines two categories of works that may qualify as works made for hire (17 U.S.C. 101). Subsection (1) covers works prepared by an "employee within the scope of his or her employment." Subsection (2) covers works that are "specially ordered or commissioned" for use in one or more of nine categories, provided that there is a written agreement, signed by the parties, designating the work as one made for hire.

It is common ground (see Pet. Br. 14) that "Third World America" does not meet the work-made-for-hire requirements under Subsection (2). That is true for two independent reasons: first, because statues do not fall within any of the categories enumerated in Subsection (2); and second, because the parties did not execute a written agreement concerning "Third World America." Petitioners contend (Br. 14), however, that Subsection (2) does not apply to commissioned works that are prepared under the close supervision of the hiring party, as was the case with the creation of "Third World America." Such commissioned works, petitioners maintain, should be regarded as works produced by an "employee within the scope of his employment," and therefore as a work made for hire under Subsection (1).

Petitioners thus appear to endorse the Second Circuit's decision in *Aldon Accessories Ltd.* v. *Spiegel, Inc.*, 738 F.2d 548, cert. denied, 469 U.S. 982 (1984). The court of appeals con-

19a-28a. Those issues are not presented by the petition. We note, however, that petitioners address the joint authorship issue at some length in their brief (at 30-32), contending that the court of appeals' view of joint authorship would permit an excessive "fractionalization of copyright" (Br. 30). We agree with petitioners that the court of appeals embraced an overly-expansive concept of joint authorship. Congress clearly intended to restrict, rather than expand, the joint-authorship doctrine as it had been articulated under the pre-1976 Act case law. See *Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill*, 89th Cong., 1st Sess. 65 (Comm. Print 1965). Moreover, we do not believe, as petitioners seem to suggest, that our construction of the statute requires a similarly expansive view of joint authorship claims. In any event, the question of joint authorship is not presented to this Court for its review.

cluded in that case that "there is no indication in the legislative history or elsewhere" that Congress intended Subsection (2) to cover commissioned artists who are "actually sufficiently supervised and directed by the hiring party to be considered 'employees' acting within 'the scope of employment' " (*id.* at 552). The Seventh Circuit subsequently adopted the same position in its decision in *Evans Newton Inc.* v. *Chicago Systems Software*, 793 F.2d 889, cert. denied, 479 U.S. 949 (1986).

The court below, following the Fifth Circuit's decision in the *Easter Seal* case, took a different approach. It held that Subsection (1) applies only to "employees" as defined by agency law principles, while Subsection (2) applies only to "independent contractors" as defined by agency law. Applying agency principles in the present case, the court concluded that "Third World America" was the work of an independent contractor, and that it was therefore subject to Subsection (2). Under that provision, the court held, the statue is not a work made for hire.

More recently, the Ninth Circuit has articulated a third view of the work-made-for-hire provisions. *Dumas* v. *Gommerman*, No. 87-6542 (Jan. 13, 1989).[4] After reviewing the statutory language and legislative history, that court concluded that "[o]nly the works of formal, salaried employees" are covered by Subsection (1), while *all* commissioned works, regardless of the supervision and control of the hiring party, must meet the work-made-for-hire criteria of Subsection (2). Slip op. 312, 317-318. The court rejected (*id.* at 317-318) the proposition that the work of an independent contractor may be encompassed within Subsection (1), explaining that "the drafters wanted a bright line between employees and independent contractors" (*id.* at 318).

We agree with the Ninth Circuit. The language, history, and purposes of the work-made-for-hire provisions make clear that Subsection (1) applies only to works produced by regular, salaried employees, while Subsection (2) applies to *all* commissioned works, regardless of whether the hiring party has exercised control over the creative process. "Third World America" is therefore governed exclusively by Subsection (2); and since it

[4] We have lodged copies of the *Dumas* case for the convenience of the Court.

does not meet the work-made-for-hire criteria under that provision, respondent, not petitioners, owns the copyright in the statue.

A. This result is compelled by the text of the Copyright Act. Subsection (2) applies to any "specially ordered or commissioned" work, not just to those works prepared without close supervision. By contrast, Subsection (1) applies to business relationships that have a "scope"—*ongoing* relationships, in other words, as opposed to contracts to create a particular work. Petitioners' agreement with respondent was plainly a "commission," in the ordinary sense of the word. It is that ordinary sense of the word that governs. "Third World America" is accordingly subject exclusively to Subsection (2) and is not a work made for hire.

B. The history of the work-made-for-hire provisions confirms the meaning of the text. At the time the provisions were drafted, the existing work-made-for-hire statute, Section 26 of the 1909 Act, had been applied by the courts only to works prepared by regular, salaried employees; it had never been applied to commissioned works. Not surprisingly, therefore, the parties who participated in the revision process understood the proposed text of Subsection (1), which was based on Section 26, to apply only to formal employment relationships. What is more, the development and drafting history of Subsection (2), which governs commissioned works, is squarely at odds with petitioners' view of the statute. That history shows that Congress deliberately narrowed the class of commissioned works that could be treated as works made for hire to nine specific categories; it did not intend to confer work-made-for-hire status on *other* kinds of commissioned works simply because they may have been prepared under close supervision. Moreover, the history shows that Congress selected the nine categories in Subsection (2) because it believed that those specific kinds of commissioned works are typically created with *more*, not *less*, supervision by the hiring party, and that they should therefore be governed by the same legal standards as works prepared by regular, salaried employees.

C. Finally, petitioners' construction of the work-made-for-hire provisions would inject unnecessary uncertainty into ordinary copyright transactions. Under petitioners' test, the determination of copyright ownership would depend upon whether the hiring party actually exercised supervision and control over the creative process. Such an assessment, however, could not be made until long after the parties had negotiated for the creation of a particular work. Petitioners' interpretation would thus render rational copyright planning more difficult in any transaction involving independent contractors.[5]

ARGUMENT

"THIRD WORLD AMERICA" IS NOT A WORK MADE FOR HIRE UNDER THE COPYRIGHT ACT OF 1976, AND RESPONDENT ACCORDINGLY OWNS THE COPYRIGHT IN IT

A. The Language and Structure Of The Statute Demonstrate That "Third World America" Is Governed Exclusively By Subsection (2) And Is Therefore Not A Work Made For Hire

In copyright cases, as elsewhere, "it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.' " *Mills Music, Inc.* v. *Snyder*, 469 U.S. 153, 164 (1985) (footnote omitted). Accord *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Aaron* v. *SEC*, 446 U.S. 680, 695 (1980); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). The text and structure of the

[5] In a January 25, 1983 letter to Senator Cochran, reproduced by petitioners as an appendix to their brief (at 1a-12a), the Copyright Office offered "tentative preliminary views" that appear to be consistent with the Second Circuit's decision in *Aldon Accessories* (see Br. 6a). The Copyright Office expressed similar views in an August 21, 1986 letter to Senator Cochran. Those views did not reflect, however, a detailed examination of the work-made-for-hire provisions. Having now conducted such an examination, the Copyright Office has concluded that the analysis of Subsections (1) and (2) articulated by the Ninth Circuit in the *Dumas* case is correct. For that reason, the Copyright Office has also withdrawn Circular R-9 (Dec. 1985), cited by petitioners in their brief (at 42-43 n. 21).

work-made-for-hire provisions make clear that "Third World America" is a "commissioned" work, subject to Subsection (2), and not the work of an "employee within the scope of his or her employment" under Subsection (1). Because "Third World America" does not meet the work-made-for-hire requirements of Subsection (2), respondent owns the copyright in the statue.

1. Subsection (2) applies to "specially ordered or commissioned" works, and it extends work-made-for-hire status whenever such a work falls into one of nine specific categories and there is a written instrument, signed by the parties, providing that the work shall be considered a work made for hire. The words "specially ordered" and "commissioned" should be given their ordinary meaning. To "commission" someone is "to appoint [him] to a certain task, mission, function or duty." *Webster's Third International Dictionary of the English Language* 457 (1986). "In the ordinary case where one person is requested by another to prepare a copyrightable work, a commissioned relationship exists." 1 *Nimmer on Copyright* § 5.03[B][2][d], at 5-26 (1988) (footnote omitted). Thus, "[a]s the phrase implies, a work prepared on special order or commission is one created upon the order or request of a party other than the author." Angel & Tannenbaum, *Works Made For Hire Under S.22*, 22 N.Y.L. Sch. L. Rev. 209, 227 (1976).

Unlike the relationship between "employer" and "employee," a "commissioned" relationship is defined by a particular project. As in the present case, the creator may have had no prior business relationship with the commissioning party; rather, his contract with the commissioning party is a contract to accomplish a particular task. By contrast, Subsection (1), which extends work-made-for-hire status to "a work prepared by an employee within the scope of his or her employment," covers business relationships that have a "scope." Thus, Subsection (1) applies to *ongoing* relationships, involving a specific stream of services that can be defined as falling "within the scope" of that relationship. Whereas a "commissioned" party contracts to create a particular work, and is otherwise free to create like

works for others, an "employee" within the meaning of Subsection (1) enjoys a formal, continuous obligation to perform services for his employer, who is entitled, for an agreed-upon salary, to request his employee to work on whatever projects are consistent with the employment relationship.

2. Petitioners construe Subsection (2) more narrowly. In their view, some commissioned works are *not* subject to Subsection (2); they assert that Subsection (2) applies only to those commissioned works prepared without the "supervision and control" of the hiring party (see Br. 15). But Subsection (2) cannot bear that narrowing construction. The provision applies, by its terms, to any "work specially ordered or commissioned"—not just to those produced without active supervision. Indeed, Subsection (2) does not focus at all on how a project is *executed*—whether or not it is closely supervised. Instead, that subsection looks to how a project is *initiated*: by "special[] order" or "commission."[6] Moreover, Subsection (2) was obviously drafted with considerable care, stating two precise prerequisites for treating "commissioned works" as works made for hire. At the same time, Congress adopted no other criterion according to which "commissioned" works could be deemed works made for hire. There is no warrant for imputing a criterion that Congress did not enact. Cf. *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980); *TVA* v. *Hill*, 437 U.S. 153, 188 (1978); *Aaron* v. *SEC*, 446 U.S. 680 (1980).

Correspondingly, petitioners construe Subsection (1) more broadly than we do. In their view, Subsection (1) applies not only to works created by regular, salaried employees, but also to commissioned works that have been produced under the supervision of the hiring party. Again, the language will not bear the weight petitioners place on it. Unlike Subsection (2), Subsection

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[6] The text of Subsection (2) suggests, if anything, that the commissioning party may quite often exercise close supervision over the projects covered by that provision. The subsection applies to "specially" ordered works. One way in which a commissioning party may place a "special" order is to state what he wants created in "starkly specific detail" (Pet. Br. 15), and thereafter to monitor its production closely.

(1) does not purport to cover commissioned works at all. And while the word "employee" may arguably be stretched to encompass a person who works under another's control, Subsection (1) does not address works prepared by "employees"; it addresses works prepared by employees "within the scope of [their] employment." That additional language—language that petitioners never address—makes it clear that Subsection (1) covers business relationships that involve a "scope" of services. It does not cover contracts to execute a discrete project.

3. When the plain meaning of the provisions is honored, it is clear that "Third World America" is not a work made for hire. Petitioners requested respondent to create a particular work of art. The parties enjoyed no prior business relationship, nor did they have any relationship thereafter. The only obligation respondent bore was to complete his portion of the statue so that petitioners could display the statue during the Christmas Pageant. In short, petitioners "commissioned" respondent to create a work.[7] "Third World America" is therefore covered by Subsection (2), and not by Subsection (1). Since sculpture is not one of the nine categories of works listed in Subsection (2), and since in any event there was no written agreement between the parties, "Third World America" cannot be deemed a work made for hire. Respondent therefore owns the copyright in the statue.

[7] Indeed, petitioner Synder testified that after resolving to participate in the Christmas Pageant, CCNV "decided to go forward and commission * * * a statue" (7/25/86 Tr. 8). In fact, Snyder and his trial counsel repeatedly used the term "commission" to describe CCNV's relationship with respondent (7/25/86 Tr. 9, 47; 2/2/87 Tr. 34, 38, 39, 40, 43; 2/6/87 Tr. 262). And in issuing a preliminary injunction in this case, the district court found that "Third World America" was "commissioned by CCNV and made on commission by the artist" (7/25/86 Tr. 49). See also 7/25/86 Tr. 15 (describing the "commission" to build the base for the statue); 2/2/87 Tr. 142 (testimony of James Earl Reid).

B. The Legislative History of The Work-Made-For-Hire Provisions Confirms The Plain Meaning Of The Text

1. The work-made-for-hire provisions were formulated between 1961 and 1966, in an extensive revision process in which the Copyright Office took the lead role, and in which various affected interests expressed their particular views.[8] Both "the content of the pre-legislative dialogue and the context in which it occurred indicate that by using the term 'employees' the parties meant to limit works made for hire under [Subsection (1)] of the definition to works created by a salaried worker in a long-term position." Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857, 890 (1987) (footnotes omitted).

At the time that the work-made-for-hire provisions were being considered, the existing work-made-for-hire provision, Section 26 of the 1909 Copyright Act, 17 U.S.C. 26 (1976 ed.), provided simply that "the word 'author' shall include an employer in the case of works made for hire." Although the statute did not define "employer" or "work made for hire," the case law under Section 26 had up to that time applied the work-made-for-hire doctrine solely in cases involving regular, salaried employees.[9] Borge Varmer's 1958 study of the work-made-for-hire doctrine, which he prepared for the Copyright Office in

[8] This Court observed in *Mills Music* that the Copyright Office assumed central responsibility for the development of the 1976 Act, including "authorizing a series of 34 studies on major issues of copyright law"; "conduct[ing] numerous meetings with representatives of the many parties that the copyright law affected"; "issu[ing] a preliminary draft revision bill"; "submitt[ing] [a] 1965 draft revision bill"; and "prepar[ing] a supplementary report to accompany the 1965 draft revision bill" (469 U.S. at 159-160).

[9] In light of the origin of Section 26, that is hardly surprising. As petitioners correctly note, Section 26 "effectively codified" (Br. 18-19 n.6) this Court's decision in *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239 (1903). There, the Court upheld an employer's claim to the copyright in three chromolithographs produced by formal, salaried employees (see 188 U.S. at 248). See also Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. Pa. L. Rev. 1281, 1284 (1987) (citing legislative history suggesting that Section 26 was intended to apply solely to works prepared by regular, salaried employees).

connection with the revision process, confirms the point. B. Varmer, *Works Made For Hire And On Commission*, Copyright Office Study No. 13, 86th Cong., 2d Sess. (Comm. Print 1960) ("Varmer 1958 Study"). In that study—which petitioners aptly describe as "[t]he genesis for the 1976 Act's work for hire provisions" (Br. 21)—Varmer examined the text of, and decisions interpreting, Section 26. He found that while the courts had not articulated a general definition of works made for hire, "all the cases have involved salaried employees who received either a fixed salary or a minimum salary plus commission" (Varmer 1958 Study, at 130). "[I]t may be concluded," he wrote, "that section 26 refers only to works made by salaried employees in the regular course of their employment" (*ibid.*).[10]

By contrast, at the time of the copyright revision the courts had not applied Section 26 or the work-made-for-hire doctrine to commissioned works. Instead, the courts had developed and applied a common law presumption that a commissioned party impliedly agrees to convey the copyright, along with the work itself, to the hiring party. The leading case was the Second Circuit's decision in *Yardley* v. *Houghton Mifflin Co.*, 108 F.2d 28 (1939), cert. denied, 309 U.S. 686 (1940). There, the court of appeals held that the City of New York owned the copyright in a mural that it had commissioned an artist to paint on the wall of a high school auditorium. In reaching that result, the court did not apply Section 26, nor did it conclude that the City was somehow the artist's "employer."[11] Instead, it "indulged" the "presumption" that "[w]hen an artist accepts a commission to paint a picture for another for pay, he sells not only the picture but also the right to reproduce copies thereof unless the copyright is reserved to the artist by the terms, express or implicit, of the contract" (108 F.2d at 30-31).[12]

2. It was in that legal context—in which work-made-for-hire status had been conferred only on works created by regular, salaried employees—that the revision of the work-made-for-hire definition took place. Not surprisingly, therefore, the Copyright Office, in its initial legislative proposal, recommended that *no* commissioned works be included within the ambit of the proposed work-made-for-hire provisions. The 1961 Report of the Register noted that "[t]he courts * * * ha[d] not generally regarded commissioned works as 'made for hire' " (*Copyright Law Revision, Report of the Register of Copyrights on the*

[10] Petitioners acknowledge (Br. 21-22, 27 n.10) the Varmer study, but they contend that "[n]one of the cases cited by Varmer * * * considered the question of whether an employment relationship exists where the artist is subject to supervision and control but does not receive a 'salary' " (Br. 27 n.10). This ignores the fact that Varmer purported to have examined all of the cases decided under Section 26; petitioners do not suggest that he overlooked any that might have been helpful to their interpretation of the work-made-for-hire doctrine. The fact that no such cases had been reported confirms Varmer's conclusion that Section 26 was not intended to apply absent a formal employment relationship. Petitioners also quote a passage from the Varmer study in which Varmer explained that works created by employees are treated as works made for hire, whereas commissioned works are not, because "an employer generally gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor" (Br. 21 (citation and emphasis omitted)). It is doubtless true, as Varmer observed, that as a general matter an "employee" is subject to closer supervision than is a commissioned artist. But Varmer did *not* state, as petitioners mistakenly assert (Br. 27 n.10), that any artist whose efforts are subject to control by a hiring party is therefore an "employee" of that hiring party for purposes of the work-made-for-hire doctrine.

[11] The *Yardley* court did not cite the work-made-for-hire provision in the 1909 Act. What is more, the court went on to hold that the artist's executor, and not the City, had the right to renew the copyright under Section 24 of the 1909 Act, 17 U.S.C. 24 (1976 ed.)—which extended the right to renew only to "authors" or their family and executors. The court of appeals thereby acknowledged, albeit implicitly, that although a commissioned party is presumed to transfer his initial copyright to the hiring party, he retains formal authorship, and thus cannot be characterized as an "employee" within the meaning of the work-made-for-hire provision. Accord *Dumas* v. *Gommerman*, No. 87-6542 (9th Cir. Jan. 13, 1989), slip op. 300 n.4.

[12] Cases following *Yardley* articulated the same presumption. See, *e.g.*, *Lin-Brook Builders Hardware* v. *Gertler*, 352 F.2d 298, 300 (9th Cir. 1965); *McKay* v. *Columbia Broadcasting System, Inc.*, 324 F.2d 762, 763 (2d Cir. 1963); *Official Aviation Guide Co.* v. *American Aviation Associates, Inc.*, 150 F.2d 173, 178 (7th Cir.), cert. denied, 326 U.S. 776 (1945); *Grant* v. *Kellogg Co.*, 58 F. Supp. 48, 51 (S.D.N.Y. 1944), aff'd, 154 F.2d 59 (2d Cir. 1946). See also Varmer 1958 Study, at 130. None of those cases held that a commissioned artist is an "employee" for purposes of Section 26.

General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. 86 (Comm. Print 1961)); and the Copyright Office therefore submitted a Preliminary Draft Bill in 1963 defining "work made for hire" as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission" (*Copyright Law Revision, Part 3, Preliminary Draft For Revised U.S. Copyright Law and Discussions and Comments on the Draft*, at 15 n.11 (1964)).

That proposal met substantial resistance, chiefly from book publishers. Significant for present purposes, however, is the fact that the publishers and their allies uniformly acknowledged that under the Copyright Office's proposal—extending work-made-for-hire status solely to works "prepared by an employee within the scope of the duties of his employment" (now Subsection (1))—only works created by regular, salaried employees could be treated as works made for hire. For example, the American Book Publishers complained that the suggested work-made-for-hire provisions would "include only work done by a salaried employee in the scope of his regular duties, and would exclude works made on special order or commission." *Copyright Law Revision, Part 4, Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law*, 88th Cong., 2d Sess. 250 (Comm. Print 1964) (Nov. 1963 letter from Dan Lacy, Managing Director, to Register of Copyrights). Similarly, John R. Peterson, representing the American Bar Association, contended that there was no "valid philosophical or economic difference between the situation in which you have a man on a continuing basis of orders which justifies placing him on your payroll, and the situation in which you give him a particular order for a particular job." In Peterson's view, a hiring party may not "have enough work to keep [the creator] on the payroll all the time, yet that work essentially is 'made for hire.' " *Copyright Law Revision, Part 3*, at 260-261. Indeed, to our knowledge, every commentator who has canvassed the legislative history of the 1976 Act has concluded that the participants in the revision debates understood the language in Section (1) to refer solely to regular, salaried employees.[13] As the Ninth Circuit recently explained, " 'plenty of discussion indicates that everyone involved understood the term ["employee"] to mean someone working for an employer in a salaried job, and understood the term to exclude freelance workers completely.' " *Dumas* v. *Gommerman*, No. 87-6542 (Jan. 13, 1989), slip op. 305-306 (emphasis and citation omitted).

Following the initial proposal of the Copyright Office in 1963, the publishers and authors debated the question whether, and to what extent, commissioned works should be added to the proposed work-made-for-hire definition. As petitioners acknowledge, however, the provision governing "employees," which would ultimately be enacted as Subsection (1), "was essentially non-controversial" (Br. 15), and was not further amended during the subsequent debates. See also Br. 28. As far as we can determine, none of the participants in those debates ever suggested that Subsection (1) might be applied to works that are not created by regular, salaried employees.

3. The subsequent development of the commissioned works provision, now Subsection (2), is also fundamentally at odds with petitioners' construction of the statute. That legislative history confirms two central propositions: First, contrary to petitioners' interpretation of Subsection (1), Congress did not intend to confer work-made-for-hire status on otherwise commissioned works that happen to be created under the close supervision of the hiring party. Rather, it carefully limited the kinds of commissioned works entitled to work-made-for-hire status to the nine categories enumerated in Subsection (2). Second and relatedly, Congress did not intend Subsection (2) to apply only to those commissioned works that are created without close supervision by the hiring party. To the contrary, Congress selected the nine categories in Subsection (2) because it was convinced that those particular kinds of commissioned works are

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[13] See, e.g., Hardy, *Copyright Law's Concept of Employment—What Congress Really Intended*, 35 J. of the Copyright Soc. of the USA 210, 225-227 (1988) (collecting contemporaneous statements); Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857, 901 (1987).

typically created *with* close supervision, and therefore should be governed by the same legal principles that apply to works of "employees" under Subsection (1).

a. In urging the Copyright Office to include at least certain kinds of commissioned works within the work-made-for-hire provisions, the publishers contended that there are "a great many works which for practical reasons are prepared 'on special order or commission' but which by their nature deserve to be treated as 'works made for hire' " (*Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 1965 Revision Bill,* 89th Cong., 1st Sess. 66-67 (Comm. Print 1965)). The publishers acknowledged that "there are many works, such as serious music and choreography, that are written 'on special order or commission' but that should not be regarded as 'works made for hire' " (*id.* at 67). Nevertheless, they reasoned that other kinds of commissioned works "are prepared by freelance authors at the instance, direction, and risk of a publisher or producer" (*ibid.*).[14] The publishers argued that the latter categories of works—which, in their view, included translations, maps, illustrations in books, front matter and appendixes, contributions to dictionaries and encyclopedias, and parts of motion pictures (*ibid.*)—should be governed by "the same legal and policy considerations dictating special treatment of 'works made for hire' " (*ibid.*).

The publishers' concerns were addressed in the 1964 revision bill. That bill provided in pertinent part that "[a] 'work made for

[14] For example, the textbook publishers contended that in the case of certain reference and collective works, such as maps, atlases, and encyclopedias, "[t]he publisher is in reality the creator • • • and hires individuals to prepare segments of it under its supervision and control (very similar to the creation of a motion picture)." *Copyright Law Revision, Part 3*, at 340-341 (1964) (letter from Ellis Arnall, Esq., on behalf of American Textbook Publishers Institute, to Register of Copyrights). Similarly, Bella Linden, attorney for the American Textbook Publishers Institute, explained that reference works such as encyclopedias and maps "are created as composite works where the publisher participates creatively and orders and commissions segments • • •." *Copyright Law Revision, Part 5, 1964 Revision Bill with Discussion and Comments*, 89th Cong., 1st Sess. 149 (Comm. Print 1965).

hire' is a work prepared by an employee within the scope of his employment, or a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire." S. 3008, H.R. 11947, H.R. 12354, 88th Cong., 2d Sess. (1964) (reproduced in *Copyright Law Revision, Part 5, 1964 Revision Bill with Discussion and Comments,* 89th Cong., 1st Sess., 9, 31 (Comm. Print 1965)). But that bill—which would have extended work-made-for-hire status to all categories of commissioned works, whenever there was a written agreement—"drew even heavier fire from the representatives of authors' organizations, who argued that an author could easily be induced to sign a form contract stating that his work is 'made for hire,' and that ordinary book publication contracts, signed before the author has completed the work and calling for an advance against royalties, could be converted into 'employment agreements' as as matter of course" (*Copyright Law Revision, Part 6*, at 67).

"In an effort to reconcile these conflicts" (*Copyright Law Revision, Part 6*, at 67), the competing parties reached a "carefully worked out compromise aimed at balancing legitimate interests on both sides" (*id.* at 66). That compromise, whose terms were embodied in a joint memorandum (see *Copyright Law Revision: Hearings on H.R. 4347 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 134 (1965)), was reflected in the 1965 revision bill. That bill defined "work made for hire" in the same form, and nearly the same terms, as the bill that Congress would ultimately approve, 11 years later, in the Copyright Act of 1976:

> (1) a work prepared by an employee within the scope of his employment; or
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for hire.

The 1965 bill thus extended work-made-for-hire status to those categories of commissioned works—but only those categories—that are ordinarily prepared "at the instance, direction, and risk of a publisher or producer" (*Copyright Law Revi-*

sion, Part 6, at 67). In addition, the Register of Copyrights made clear that under the 1965 bill only the "four special cases specifically mentioned" could be treated as works made for hire, and only if there is a written agreement. "Other works made on special order or commission," the Register explained, "would not come within the definition." *Id.* at 67-68.

In 1966, Congress drafted a revised bill that expanded the categories of commissioned works contained in Subsection (2) to include "a compilation," "an instructional text," "a test," and "an atlas." See H.R. Rep. No. 2237, 89th Cong., 2d Sess. 116 (1966). In the accompanying report, the House, approving the language of the 1965 Register's supplementary report, reiterated that the work-made-for-hire provisions were " 'a carefully worked out compromise aimed at balancing legitimate interests on both sides' " (*id.* at 114). The House noted that the status of commissioned works had "been a continuing issue" (*id.* at 115). On the one hand, the House stated, "some commissioned works concededly should not be regarded as made for hire" (*ibid.*); in other cases, however, "the distinction between works made for hire or on commission is a purely technical one" since "in either case the work is prepared at the employer's initiative and risk and under his direction" (*ibid.*). "The problem," the House explained, "is how to draw a statutory line between those works written on special order or commission that should be considered as works made for hire, and those that should not" (*ibid.*). Although the 1965 revision bill had "moved in the direction of a solution" (*ibid.*), the House noted that the affected parties had reached a further "compromise • • • aimed at adding additional categories to the four types of commissioned work dealt with specially in the definition of works made for hire" (*id.* at 116). The House agreed to incorporate that compromise.

With the single addition of "answer material for a test," the 1976 Act, as enacted, contained the same definition of works made for hire as did the 1966 revision bill, and it contained the same structure and nearly the same terms as the 1965 bill. In the accompanying report, the House reiterated that "[t]he basic

problem is how to draw a statutory line between those works written on special order or commission that should be considered as 'works made for hire' and those that should not" (H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976)). It also stated plainly that "[t]he definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered 'works made for hire' under certain circumstances" (*ibid.*).

b. Petitioners' analysis of the work-made-for-hire provisions cannot be squared with this history. Plainly, Congress did not intend to permit any and every kind of commissioned work to be deemed a work-made-for-hire, simply because it may have been prepared under the supervision of the hiring party. To the contrary, Congress chose *particular* categories of commissioned works to include in Subsection (2), and it refused to expand that set any further.[15] Moreover, Congress's reasons for choosing those particular categories belie petitioners' supposition that Subsection (2) applies only to unsupervised commissioned works. Indeed, just the opposite is true: Congress selected the

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[15] For example, the 1969 Senate revision bill proposed that Subsection (2) be expanded to include works specially ordered or commissioned for use "as a photographic or other portrait of one or more persons." The Copyright Office objected to that proposal, explaining that "[t]he addition of portraits to the list of commissioned works that can be made into 'works made for hire' by agreement of the parties is difficult to justify. Artists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law, and it seems clear that, like serious composers and choreographers, they were not intended to be treated as 'employees' under the carefully negotiated definition in section 101." *Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill*, ch. XI, at 12-13 (1975). The Copyright Office thus viewed Subsection (2) of the work-made-for-hire provisions as a closed set, embracing only those categories of "specially ordered or commissioned" works that deserved to be treated, as a legal matter, in the same way that works of an "employee" were treated under Subsection (1). Photographs, the Copyright Office concluded, were not intended to be included within that closed set—even if, in a particular case, the photographer worked under the close supervision of the hiring party. The proposal to add photographs to Subsection (2) was ultimately abandoned in Congress.

nine categories in Subsection (2) because it was persuaded that, like the work of an "employee acting within the scope of his employment," those categories of commissioned works, but only those categories, are typically "prepared at the employer's initiative and risk and under his direction" (H.R. Rep. No. 2237, *supra*, at 115).

In effect, if not by design, petitioners propose to unravel Congress's " 'carefully worked out compromise aimed at balancing legitimate interests on both sides' " (H.R. Rep. No. 2237 at 114). Under their approach, *any* commissioned work can be a work made for hire, so long as the hiring party has controlled its production. But the legislative history shows that when Congress was persuaded that a type of work is typically prepared under close supervision, it included that work as a distinct category within Subsection (2). Congress "dr[e]w a statutory line" (H.R. Rep. No. 2237 at 115) at nine categories. Petitioners have no warrant for revising that congressional design.[16]

3. Petitioners nevertheless contend that by the time Congress enacted the Copyright Act of 1976, there was a line of cases holding that under Section 26 of the 1909 Act—the old work-made-for-hire provision—an employment relationship

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[16] As one commentator has summarized the point:

> The legislative history shows that Congress intended that only a commissioned work in one of the enumerated categories could become a work made for hire. Nonenumerated commissioned works may not become works made for hire, even by a written agreement. Whether a commissioned work falls under the works-made-for-hire provision does not depend on whether the commissioner or the independent contractor is the true creator. Congress simply enumerated nine types of works that appeared to it to be created under conditions very similar to employment. • • • In structuring the provision this way, Congress mirrored the policy applied to works created by employees: to reward the party at whose economic risk the work was prepared.

Note, *The Creative Commissioner: Commissioned Works Under The Copyright Act of 1976*, 62 N.Y.U. L. Rev. 373, 385-386 (1987) (footnotes omitted). Accord Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. Pa. L. Rev. 1281, 1295 (1987); Angel & Tannenbaum, *Works Made for Hire Under S. 22*, 22 N.Y. L. Sch. L. Rev. 209, 236-237 (1976).

exists whenever the hiring party has exercised control or supervision over the artist's work (Br. 18-19). Petitioners surmise that Congress must have intended to adopt that line of cases when it enacted Subsection (1), since "[n]owhere in the 1976 Act or in the Act's legislative history d[id] Congress state that it intended to jettison the control standard or otherwise to reject the pre-Act judicial approach to identifying a work for hire employment relationship" (Br. 20). That contention is mistaken for two reasons.

First, petitioners do not point to any evidence that Congress actually intended to enact the judicial definition of "employment" to which they advert.[17] Petitioners rely, instead, on Congress's failure "to jettison" that definition. But ordinarily "Congress' silence is just that—silence" (*Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987));[18] and silence in the legislative history cannot impeach the plain meaning of Subsection (2) (see *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 6; *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980)).

Second and in any event, petitioners' account of the legislative history is mistaken. As we showed above, the structure of the work-made-for-hire provisions was fully developed by 1965, and its text was agreed upon in essentially final form by

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[17] Indeed, "[t]here is no indication that anyone involved in copyright revision later became aware of the line of cases expanding the work made for hire doctrine." Litman, *supra*, 72 Cornell L. Rev. at 901 (footnote omitted). As amici curiae Computer and Business Equipment Manufacturers Association, et al. concede, "[n]owhere do the House and Senate Reports • • • even refer to" this line of cases (Br. 10).

[18] Congress's failure *explicitly* to incorporate the judicial construction of "employment" is particularly telling, since in other respects Congress made clear when it intended to embrace existing case law. See, *e.g.*, H.R. Rep. No. 1476, at 121 ("There is • • • no need for a specific statutory provision concerning the rights and duties of the coowners [*sic*] of a work; court-made law on this point is left undisturbed"). Accord *Dumas* v. *Gommerman*, slip op. 313-314. Moreover, in other instances, Congress clearly altered preexisting case law *without* expressly signalling in the legislative reports that it was doing so. See, *e.g.*, Litman, *supra*, 72 Cornell L. Rev. 901 n.275 (discussing provision regarding automatic vesting of copyright upon fixation).

1966.[19] As of that time, the courts had applied the work-made-for-hire doctrine exclusively in cases involving regular, salaried employees, and had not included commissioned works within the ambit of Section 26 of the 1909 Act.[20] It was not until 1966 that the Second Circuit, in a line of cases beginning with *Brattleboro Publishing Co.* v. *Winmill Publishing Corp.*, 369 F.2d 565, brought commissioned works within the ambit of the term "employer" under the 1909 work-made-for-hire doctrine.[21] Accord *Murray* v. *Gelderman*, 566 F.2d 1307 (5th Cir. 1978) (applying 1909 Act); *Epoch Producing Corp.* v. *Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975), cert. denied, 424 U.S. 955 (1976); *Picture Music, Inc.* v. *Bourne, Inc.*, 457 F.2d 1213 (2d Cir.), cert. denied, 409 U.S. 997 (1972). That conclusion, which the *Yardley* court had rejected (see pages 14-15 & n.11, *supra*), was entirely new law. As the Ninth Circuit has recently explained, the *Yardley* presumption "was gradually expanded into a presumption that anyone who paid an artist to create a

[19] Cf. *Mills Music*, 469 U.S. at 160-161 (footnotes omitted) ("[a]lthough additional hearings were held in subsequent sessions, and revision bills were submitted to Congress in each term for the next 10 years, discussion over the termination provisions • • • was essentially completed at this time. Congress enacted the termination provisions • • • in the 1976 Act in virtually the same form as they appeared in the 1965 draft revision bill").

[20] As one commentator has put it, "[i]n 1965, when the parties reached [their] compromise, courts had not yet extended the scope of works made for hire to include commissioned works. That particular line of cases developed in the decade to follow." Litman, *supra*, 72 Cornell L. Rev. at 890 n.215.

[21] In *Brattleboro*, a newspaper contended that its copyright in certain advertisements had been infringed by a direct mail circular that published the same advertisements at the request of the advertisers. The court of appeals rejected the newspaper's claims, holding that under Section 26 of the 1909 Act the newspaper did not own the copyright in the advertisements. The court noted the presumption under *Yardley* that "the copyright shall be in the person at whose instance and expense the work is done" (369 F.2d at 567), and it perceived no reason why that presumption should not be extended to a situation where "the parties bear the relationship of employer and independent contractor" (*id.* at 568). Rather than presuming that the contractor conveyed the copyright, however, the court presumed that the hiring party was actually the "employer" for purposes of the work-made-for-hire doctrine.

copyrightable work was the statutory author under the work for hire doctrine." *Dumas* v. *Gommerman*, No. 87-6542 (Jan. 13, 1989), slip. op. 300 (footnote omitted).

The fact remains, however, that by as late as 1966—at which point the revision of the work-made-for-hire provisions was essentially complete—the courts had applied Section 26 of the 1909 Act only to works created by regular, salaried employees, and never to works made on commission. Petitioners' analysis of the 1976 Act—which rests on the premise that Congress failed "to jettison" the *Brattleboro* line of cases—simply does not hold up. Congress could not have "jettisoned" a line of cases that had not yet been decided when the revised work-made-for-hire provisions were formulated.[22]

C. Petitioners' Construction of the Work-Made-For-Hire Provisions Would Subject Copyright Negotiations To Excessive Uncertainty

The drafters of the work-made-for-hire provisions "intended the definition to be tailored to the realities of the copyright

[22] There is another, more general reason why it is appropriate in this case to regard 1965-1966, rather than 1976, as the relevant period for fixing legislative intent. The Copyright Act of 1976 was largely the product of "compromise between competing interests" and most of the Act, including the work-made-for-hire provisions, "was drafted by the Copyright Office, which is itself an arm of Congress" (*Mills Music*, 469 U.S. at 182 n.6 (White, J., dissenting)). "The legislative materials disclose a process of continuing negotiations among various industry representatives, designed and supervised by Congress and the Copyright Office and aimed at forging a modern copyright statute from a negotiated consensus." Litman, *supra*, 72 Cornell L. Rev. at 862. Here, as in *Mills Music* (see 469 U.S. at 160-161), the relevant statutory provisions were fully negotiated between the parties by about 1965, and Congress thereafter did little or nothing to upset the compromise reached by the competing factions. Indeed, the enacted provisions reflect exactly the compromise struck by the publishers and authors ten years earlier. Petitioners' construction of the work-made-for-hire provisions, which reads into them a line of judicial decisions that could not possibly have been before the various parties during the relevant time period, is for that reason unfaithful to the essentially "contractual" nature of the compromises adopted in Subsections (1) and (2). Cf. Easterbrook, *Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 46 (1984).

marketplace." *Dumas* v. *Gommerman,* slip op. 318 n.18. In a rational "copyright marketplace," parties negotiate with an expectation that one or the other of them will clearly be the owner of the copyright in the completed work. Armed with that knowledge, the parties can then more readily settle on the relevant contractual terms—such as the price for the work, and who shall have rights to future reproduction when the work is completed and ready for exploitation.

Petitioners' construction of the work-made-for-hire provisions makes such rational planning much more difficult. Because the "supervision and control" test turns on whether the hiring party has closely monitored the creation process, the parties cannot know until late in the day whether a work will ultimately be deemed to be one for hire under Subsection (1). Indeed, the determination whether the hiring party "actually sufficiently supervised and directed" the production process (*Aldon Accessories,* 738 F.2d at 552) cannot be made with confidence until the production process has been completed. Thus, under petitioners' approach "buyers and sellers will have to predict in advance whether the buyer's 'actual control' over a given work will make it the 'author.' If they guess incorrectly, their reliance on 'work for hire' or an assignment may give them a copyright interest that they did not bargain for." *Easter Seal Society* v. *Playboy Enterprises,* 815 F.2d 323, 333 (5th Cir. 1987). Accord *Dumas* v. *Gommerman,* slip op. 314.[23]

The present case illustrates the kind of uncertainty that petitioners' approach entails. In making its determination that respondent was an "employee" within the meaning of Subsection (1), the district court relied on the fact that during the creative process respondent "was visited on a number of occasions by various CCNV members, ostensibly to check on his

[23] Moreover, petitioners' interpretation "leaves the door open for hiring parties, who failed to get a full assignment of copyright rights from independent contractors falling outside the subdivision (2) guidelines, to unilaterally obtain work-made-for-hire rights years after the work has been completed as long as they directed or supervised the work, a standard that is hard not to meet when one is a hiring party." Hamilton, *supra,* 135 U. Pa. L. Rev. at 1304. Accord Hardy, *supra,* 35 J. of the Copyright Soc. at 250.

progress" (Pet. App. 33a), and that petitioners made their final payment to respondent "only when satisfied, upon delivery, that the statu[e] did, indeed, convey the message they had intended for it" (*id.* at 35a). The court also observed that petitioners had "directed enough of [respondent's] effort to assure that, in the end, he had produced what they, not he, wanted" (*ibid.*). And at trial, petitioners found it necessary to establish that they had made 10-15 trips to Baltimore during the creative process (7/25/86 Tr. 12); that they had told respondent what materials to purchase as he was sculpting the work (*id.* at 45); that they had instructed respondent to alter the posture of the figures in the statue (2/2/87 Tr. 25-26); and that they had prevailed in all of the 3-5 disagreements with respondent concerning the creation of the statue (*id.* at 29).

Petitioners' "supervision and control" test inevitably turns on such after-the fact considerations.[24] By contrast, the Ninth Circuit's interpretation, which we endorse, is susceptible to ready application at the outset of the negotiation process. If the creator is a regular, salaried employee of the hiring party, then the work is governed by Subsection (1); if the creator is commissioned to prepare a particular project, and otherwise has no formal, ongoing relationship to the hiring party, then the work is governed by Subsection (2). The parties will know where they

[24] The Second Circuit's decision in *Aldon Accessories,* on which petitioners prominently rely (Br. 20, 30, 32 n.13, 33), also illustrates the speculative nature of the "supervision and control" test. There, the court of appeals concluded that certain Japanese and Taiwanese artists who had created the figurines ordered by the plaintiffs were "employees" under Subsection (1) because "[t]here was evidence that [plaintiffs] actively supervised and directed the[ir] creation" (738 F.2d at 553). The court relied on the fact that one of the plaintiffs had "stood over the artists and artisans at critical stages of the process, telling them exactly what to do" (*ibid.*)—including, " 'changing shapes, adjusting attitudes and proportions' " and instructing the artists to " 'put the leg this way, make this proportion, put the head this way, make the hair that way' " (*id.* at 550). The cases that have followed *Aldon Accessories* turn on the same after-the-fact analysis. See, *e.g., Nadel & Sons Toy Corp.* v. *W. Shaland Corp.,* 657 F. Supp. 133, 135 (S.D.N.Y. 1987); *Sandwiches, Inc.* v. *Wendy's Int'l, Inc.,* 654 F. Supp. 1066, 1073 (E.D. Wis.), appeal dismissed, 822 F.2d 707 (7th Cir. 1987); *Iris Arc* v. *S.S. Sarna, Inc.,* 621 F. Supp. 916, 920 (E.D.N.Y. 1985).

stand at the outset, and they will not be able to alter the original bargain by after-the-fact supervision of the creative process. That approach, moreover, will not only facilitate the process of contractual negotiation, but should also minimize the need for highly fact-bound and unpredictable litigation. And, not least of all, it will give the work-made-for-hire provisions their plain and evident meaning.[25]

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[25] Under 17 U.S.C. 105, a "work of the United States Government"—which is defined as "a work prepared by an officer or employee of the United States Government as part of that person's official duties" (17 U.S.C. 101)—is not available for copyright protection. Petitioners correctly note (Br. 34) that Congress intended "works of the United States Government" to be construed in the same way as "works made for hire" (see H.R. Rep. No. 1476, at 58). From that premise, petitioners contend that "an overly restrictive interpretation of the term 'employee' in the work for hire provisions" would likewise narrow the scope of the parallel language in Section 105 and thereby impair the prospect for the "broadest publicity for matters of government" (Br. 35). In fact, however, Congress itself imposed a "restrictive" interpretation on the reach of Section 105, by explicitly stating that Section 105 does not apply to "work[s] prepared under U.S. Government contract or grant" (H.R. Rep. No. 1476, at 59). That restriction limits the scope of Section 105 precisely to parallel the scope of Subsection (1), as we have construed it. Just as works "of an employee within the scope of his or her employment" do not encompass commissioned works, works "prepared by an officer or employee of the United States Government as part of that person's official duties" do not encompass contracts to complete a particular project.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Petitioners,

v.

JAMES EARL REID,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICI CURIAE* OF THE AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS AND THE COPYRIGHT JUSTICE COALITION IN SUPPORT OF THE RESPONDENT

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BRIEF *AMICI CURIAE* OF THE AMERICAN SOCIETY OF MAGAZINE PHOTOGRAPHERS AND THE COPYRIGHT JUSTICE COALITION IN SUPPORT OF THE RESPONDENT

The American Society of Magazine Photographers and The Copyright Justice Coalition submit this brief as *amici curiae* in support of the respondent James Earl Reid. The parties to the case have consented in writing to the filing of this brief in accordance with Rule 36 of the Rules of this Court. Copies of the letters of consent have been filed with the Clerk.

INTEREST OF THE AMICI CURIAE

The American Society of Magazine Photographers ("ASMP") is the largest national organization of professional photographers engaged in the publication of photographs. Most of ASMP's nearly 5,000 members are freelance photographers whose work is produced on a commissioned basis—that is, they are retained by a magazine, advertising agency or corporation only to take photographs for a specific project. They are usually paid a flat fee representing payment for one-time publication rights by magazines or newspapers, or for certain other specified rights by advertising agencies or corporations.

ASMP members are generally not accorded employment benefits. They are not paid a regular salary, do not receive a paid vacation, and must purchase their own cameras and laboratory equipment. They are responsible for all of the overhead expenses associated with running a business, must pay the costs of their own health and liability insurance, and are not eligible to participate in the pension and retirement plans offered to employees of the commissioning parties. Given these responsibilities and limited resources, the entrepreneurial risks assumed by ASMP members when they accept a commissioned project are far greater than those of the publisher or advertising agency in undertaking that project.

These characteristics are also typical of the over 100,000 individual creators represented by The Copyright Justice Coalition ("CJC"), in which ASMP is an active member. The CJC is an *ad hoc* group of 50 organizations whose individual members include most of the freelance creators in the United States, including photographers, designers, visual artists, illustrators, writers, cartoonists, actors, and songwriters.[1] They produce a vast array of commissioned works for the publishing and advertising industries, and for corporations throughout the United States.

After the Copyright Act of 1976 went into effect in 1978, freelance creators represented by ASMP and the CJC experienced a dramatic change in their business relationships with these clients. Before 1978, many publishers and newspapers were satisfied with securing one-time publication rights, and advertising agencies and corporations were content with a limited grant of rights, in exchange for the fee paid for the commissioned work. The explicit authorization of "work made for hire" ("work for hire") agreements in Section 101 of the 1976 Copyright Act, however, resulted in the imposition of non-negotiable work for hire arrangements on freelance photographers and other creators. Under those arrangements, commissioning parties became the "authors" of, and acquired all rights in, the freelancer's work for the duration of the 75- to 100-year copyright term applicable to works for hire. 17 U.S.C. §§ 201(b), 302(c). Generally, however, the compensation paid the freelancer did not increase commensurately. While freelancers continued to receive compensation reflecting only the purchase of limited or one-time publication rights, they relinquished *forever* all rights to all future uses under work for hire agreements.

Although some freelancers have no choice but to sign work for hire agreements in order to survive, many

[1] The member organizations of the CJC are listed in Appendix A to this brief.

established professionals refuse to do so. Forfeiture of all copyright rights under a work for hire agreement threatens freelancers' very ability to earn a living. They rely heavily for basic living expenses on the income-producing potential of their works through reuse fees, creation and distribution of derivative works, and royalty payments from licensing arrangements. Retention of copyright rights and the potential income such rights may generate over many years is the only reliable source of sustained income that many freelancers have. Freelancers are generally willing to assign to publishers or other commissioning parties all rights necessary for those parties to exploit fully the work for the particular use intended. But in order to survive, freelancers must retain all remaining rights to ensure their own ability to benefit financially from future uses of their work.

Freelance creators' freedom to choose whether to engage in a work for hire arrangement has been effectively cut off by the development of case law holding them to be "employees" for copyright purposes, even though they have either refused to sign a work for hire agreement or have never been given the opportunity to negotiate the terms of such an agreement. Freelancers who struggle daily with the burdens of being self-employed are appalled when they are subsequently categorized as "employees," although they have received no employment benefits and, in fact, have operated as independent contractors. They are outraged to be faced with the prospect of losing all rights in their works *even when they have exercised their statutory right to refuse to sign a work for hire agreement.*

The working relationship between freelancers and commissioning parties often entails substantial interaction between them; indeed, such interaction may be necessary to ensure the project's success. Under petitioners' interpretation of the statute, however, that interaction penalizes freelancers by placing them in an impossible situation: they either must agree to a work for hire arrangement and try to negotiate a fee that accu-

rately predicts the full value of all rights in the work, or receive only a one-time usage fee and risk losing all rights to future uses by later being treated as an "employee." The gross inequity of this Hobson's choice prompted the involvement of ASMP and the CJC in this litigation in the court of appeals and before this Court.

SUMMARY OF ARGUMENT

Twenty-four years ago, after hard-fought negotiations brokered by the Copyright Office in the context of drafting a new copyright law, representatives of freelance creators reached what has been termed an "historic compromise" with the industries that commissioned their works. A central part of that compromise was a revision in the "work made for hire" doctrine under which the employer of the actual creator rather than the creator is, in specified circumstances, deemed to be the author and owner of all rights in the work. Freelance creators and industry agreed in 1965 that this doctrine would apply in only two situations: (1) where works are created by formal salaried employees within the scope of their employment, and (2) with respect to commissioned works, where the work falls within one of the statutorily enumerated types of subject matter, *and* both parties expressly acknowledge in writing that the work is to be considered "made for hire." One year later, in a 1966 legislative report, the House Judiciary Committee endorsed the compromise, thereby laying the issue to rest. Ten years later, after numerous other copyright issues had been resolved, Congress included this long-settled compromise in the definitional provisions of the Copyright Act of 1976.

Consistent with the compromise, the Act's provisions establish a bifurcated definition of "work made for hire." 17 U.S.C. § 101. Subsection (1) of the definition provides that a work for hire is a work prepared by an "employee" in the course of his or her employment. Subsection (2) authorizes nine enumerated categories of

works created on "special order or commission" which may be works for hire, but only if the parties expressly agree in writing that the work shall be considered "made for hire." The two provisions are intended to be mutually exclusive: subsection (1) is limited to formal, salaried employees; subsection (2) is the sole mechanism through which commissioned works, created outside the salaried employment relationship, are to be treated as works for hire.

Congress did not define the term "employee" in subsection (1) because when the 1965 compromise was struck, all the participants in the copyright revision process had the same understanding of that term and, therefore, believed a statutory definition was unnecessary. Consistent with the case law that had developed at that time under the 1909 Act's conclusory reference to work for hire, the Copyright Office, the affected industries and creators *all* understood that an "employee" for work for hire purposes was a person who was paid a regular salary and received other employment benefits. This understanding was based on the belief that an "employee" could fairly be presumed to have given up all authorship and copyright rights in works produced in the course of formal employment in exchange for a regular salary and other employment benefits, and the assumption by the employer of all of the risks associated with creation and distribution. No one involved in the copyright revision process, including those few publishers which have filed a brief *amici curiae* in support of petitioners, expressed the belief that this presumption could be invoked with respect to works created by freelance artists.

Petitioners, supported by numerous parties that routinely commission freelance work, now seek to rewrite the 1965 compromise on work for hire. Recognizing that the sculpture created by respondent James Earl Reid cannot qualify as a work for hire under subsection (2), petitioners propose to convert him into an "employee" under subsection (1). Under petitioners' inter-

pretation, a freelance creator—even one like Reid who volunteers his services—automatically loses all rights in the work if the commissioning party exercises what a court *later* deems to be a sufficient amount of supervision and control over the freelancer's labors, a test that can almost always be met given the hiring party's initiation of the project and right to reject a work as unsatisfactory.

This interpretation twists the 1976 definition of work for hire beyond recognition. It cannot be reconciled with the language, structure, and purpose of subsections (1) and (2), which deliberately distinguish between the works of formal salaried employees and "specially ordered or commissioned" works. Petitioners' interpretation is also contrary to the extensive legislative history of that definition, which, following the clear language of the statute, shows that subsection (2) was carefully crafted as the *exclusive* provision under which freelance works could qualify as works for hire, and that the reference to "employee" in subsection (1) was confined to formal, salaried employment.

Nothing in the legislative history reveals any intent to adopt petitioners' "supervision and control" test to transmogrify a freelance creator into an "employee." Indeed, as the courts below have observed, actual supervision and control is irrelevant to formal, salaried employment. It is also irrelevant where a work admittedly qualifies as made for hire under subsection (2). Thus, petitioners in effect propose judicial rewriting of the statute by application of a test that is irrelevant to its purpose.

In doing so, petitioners rely on case law that developed under the old (and much different) copyright statute and that was handed down only *after* the 1965 historic work for hire compromise was reached (but before it was ultimately enacted by Congress in the 1976 omnibus revision). The crafters of the 1965 compromise could not have intended to adopt this *subsequent* case law. Petitioners' central argument—that Congress intended to import post-1965 case law into subsection (1) of the work for hire definition—rests on their contention that congressional silence with respect to that case law should be construed as an intent to adopt it. That presumption is questionable at best where Congress continues prior law without substantial change; it is totally without merit where Congress rewrites the entire Act including the statutory definition at issue.

By enacting the 1965 compromise, Congress codified the accommodations won by industry. The Act provides that contributions to collective works, supplementary works and motion pictures, among others, are eligible for work for hire treatment, provided the written consent of the creator is obtained. In addition, creators of works for hire do not have access to the reversionary rights normally exercisable thirty-five years after a transfer of copyright rights. Industry secured these concessions by agreeing that they would be conditioned upon securing the requisite written agreement from the freelance creator. Petitioners now are attempting to obtain a judicial revision of the bargain which will preserve the accommodations they won, while reclaiming the concessions they made.

Contrary to the assertions of publishers and other commissioning parties supporting the petitioners, the Court of Appeals decision in this case is fully consistent with the fundamental purposes of the Copyright Act. Even if a commissioned work is not included in the subsection (2) categories and thus is statutorily ineligible to be a work for hire, publishers and other commissioning parties can acquire all the rights they need simply by obtaining a written assignment of copyright. Of course, freelance creators may insist on fair compensation for transferring the rights that petitioners' *amici* claim are so desperately needed to bring the work to the public. And creators can exercise their statutory right of reversion thirty-five years after the assignment is executed. But these rights properly belong to creators under the Copyright Act. Preserving these rights comports fully with

a central purpose of the Act—to reward creators. The Constitution, after all, speaks of "Authors and Inventors," not purveyors. U.S. Const., art. I, § 8.

While ASMP and the CJC agree with the result reached by the court below, the court's analysis was flawed to the extent that it held that recourse to the Restatement of Agency is appropriate in determining whether a freelance creator is an "employee" under subsection (1). Adoption of the Restatement standard has no basis in the language or legislative history of the 1976 Copyright Act. The legislative history of the Act shows that the term "employee" was deliberately limited to those working in a formal, salaried relationship. The court below erred in adopting a test for employment that Congress never endorsed and that would require consideration of a factor—the power to supervise and control—that Congress meant to abandon.

The interpretation of the statute advanced by ASMP and the CJC was recently adopted by the Ninth Circuit in *Dumas v. Gommerman*, No. 87-6542 (9th Cir. January 13, 1989). In an opinion written by Judge Fletcher, the Ninth Circuit undertook an intensive examination of the legislative history of the work for hire definition and concluded that subsection (1) applies only to formal, salaried employees. The court further held that the agency law principles adopted by the Fifth and District of Columbia Circuits to decide who is an "employee" under subsection (1) were inconsistent with congressional intent to establish a "bright line" between employees and independent contractors. Consistent with the arguments presented in this brief, the Ninth Circuit ruled that commissioned works are works for hire under the 1976 Act only if the requirements specified in subsection (2) of the work for hire definition are satisfied. That conclusion, and the analysis supporting it, restore to freelance creators the ability to retain and to profit from the authorship and copyright rights in their own works as intended by Congress when it enacted the 1976 Act. ASMP and

CJC therefore urge this Court to adopt the Ninth Circuit's construction of the Act.

ARGUMENT

I. SUBSECTION (2) IS THE EXCLUSIVE PROVISION FOR DETERMINING WHETHER COMMISSIONED WORKS QUALIFY AS "WORKS MADE FOR HIRE"

The definition of "work made for hire," enacted as part of the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, establishes two alternative and mutually exclusive standards for determining whether copyrightable works should be considered works for hire. First, the definition provides that a work prepared by "an employee within the scope of his or her employment" is a work for hire. 17 U.S.C. § 101 (subsection (1) of definition of "work made for hire"). No agreement, in writing or otherwise, is required. Instead, the mere nature of the relationship between the employer and employee is deemed sufficient to confer work for hire status upon all works prepared in the course of the employee's employment.

Second, the statute adopts a very different approach with respect to works created "on special order or commission." 17 U.S.C. § 101 (subsection (2) of definition). That approach was the outcome of an "historic compromise" between publishers and authors. *See* W. Patry, *Latman's The Copyright Law* 121 (6th ed. 1986) ("Patry, *Copyright Law*"). The essential elements of that compromise were in place in 1965, were endorsed by the House Judiciary Committee in 1966, and were adopted ten years later as part of the 1976 Copyright Act. Under that compromise, only commissioned works falling within enumerated types of subject matter were deemed eligible for work for hire status, and only when the artists who created them agreed in writing that their works would be considered "made for hire."[2] For all

[2] While subsection (2) does not expressly require a work for hire agreement to be signed before commencement of the project, the drafters of the compromise viewed that requirement as implicit in the provision. Participants in the copyright revision

other types of commissioned works, the commissioning party was left free to obtain all rights by transfer from the artist. This structure confirms that Congress intended subsection (2) to be the exclusive means for determining whether works created on special order or commission should be treated as works for hire.

Petitioner's argument that subsection (1) should be interpreted also to incorporate works created by independent contractors is contrary to the language, structure and purpose of the statute. The definition explicitly distinguishes between works prepared by employees within the scope of their employment and works created pursuant to a "special order or commission."[3] If Congress had intended subsection (1) to cover independent contractors it would have specifically so provided, rather than referring only to "employees." Moreover, Congress clearly showed its intent to make subsections (1) and

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process understood that work is not created "on special order or commission" under subsection (2) unless the contract itself is signed before initiation of the project. *See* Copyright Law Revision, Part 5, 1964 Revision Bill With Discussion and Comments 145 (Comm. Print 1965) (statement by Barbara Ringer) ("1964 Revision Bill"). As the unfortunate experiences of photographers and other creators have shown, avoidance of this requirement by commissioning parties subverts the whole purpose of the writing criterion, which is to allow creators to make a free and independent decision whether to agree to a work for hire arrangement. *See* 134 Cong. Rec. S14560 (daily ed. Oct. 5, 1988) (remarks of Sen. Cochran giving example of commissioning party stamping work for hire agreement on back of check, thus requiring creator to sign the agreement as the condition for getting paid for work already completed).

[3] The phrase "specially ordered or commissioned" is not defined in the 1976 Act. Under the ordinary meaning of that phrase in the industry, a work is specially ordered or commissioned when an artist is retained in advance for a specific project to be prepared in accordance with the commissioning party's specifications. Respondent's sculpture, as well as many of the works created by freelance creators, fits this definition.

(2) mutually exclusive by using the word "or" in separating the two subsections.[4]

Congress did not intend courts to determine first whether a commissioned work meets the criteria set forth in subsection (2), and then, assuming the criteria are not met, ascertain whether the commissioning party exercised a sufficient amount of supervision and control to render it an "employee" work for hire under subsection (1). This strained and illogical approach to the statute, which is reflected in the decision of the Second Circuit in *Aldon Accessories v. Spiegel*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984), and in briefs filed by petitioners and *amici* supporting them in this case, cannot be reconciled with the language and structure of the 1976 definition of work for hire. Nor, as the discussion below shows, is this approach compatible with the legislative history of that definition.

II. THE LEGISLATIVE HISTORY OF THE 1976 DEFINITION OF WORK FOR HIRE DEMONSTRATES THAT COMMISSIONED WORKS CREATED OUTSIDE THE TRADITIONAL FORMAL EMPLOYMENT RELATIONSHIP QUALIFY AS WORKS FOR HIRE ONLY IF THE CRITERIA SET FORTH IN SUBSECTION (2) ARE SATISIFIED

Petitioners' argument that Congress intended to establish supervision and control as the controlling standard for determining work for hire eligibility of commissioned works finds absolutely no support in the legislative history of the 1976 Act. Petitioners have not cited, because none exists, a single statement in a legislative report, a single reference in a Copyright Office revision study, or a single

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[4] Petitioners' argument also renders meaningless the clause "scope of employment" in subsection (1). Under their approach, all works created by independent contractors that are supervised and controlled are automatically within their "scope of employment." Congress obviously intended otherwise.

comment in 14 years of hearings, that indicates such an intent. On the contrary, the substantial relevant legislative history, reviewed by the Ninth Circuit in *Dumas v. Gommerman*, supports the result urged here by ASMP and CJC. In the face of that history, petitioners' analysis distorts the stages in the development of the 1976 work for hire definition and obscures the statute's clear meaning. A complete analysis of the development of the work for hire definition, against the backdrop of the 1900 Copyright Act, demonstrates the error in petitioners' reasoning.

A. Congress Intended Work for Hire Under the 1909 Act To Be Limited to the Formal Employment Relationship

The work for hire concept had its genesis in the common law before its first codification in the Copyright Act of 1909. 17 U.S.C. § 1 *et seq.* (1970) (repealed 1976), Ch. 320, 35 Stat. 1025 (the "1909 Act"). In two early cases, the courts recognized that the copyrightable fruits of an employee's labors should belong to the employer. *See Colliery Eng. Co. v. United Corresp. Schools Co.*, 94 F. 152 (C.C.S.D.N.Y. 1899); *Little v. Gould*, 15 F.Cas. 612 (C.C.N.D.N.Y. 1852) (No. 8395). Both courts reached this commonsense result in traditional employment contexts that justified divestment of the employee's copyright rights in light of the benefits accorded him. The same was true in *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), the only other case in which this Court has addressed the work for hire issue. In that case, the Court found that the copyrights in certain advertising lithographs belonged to the employers of the designers of those works because the works were produced "by persons employed and paid by the plaintiffs in their establishments to make those very things." *Id.* at 248 (citations omitted). The recitation of facts in the lower court opinion shows that the employer and designer in that case enjoyed a traditional employment

relationship. *See Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993 (C.C.A.Ky. 1900).

When Congress codified the work for hire doctrine in the 1909 Act, it did so by defining "author" to include the "employer in the case of works made for hire." 17 U.S.C. § 26 (1970) (repealed 1976). The legislative history of the 1909 Act shows that the reference to "employer" in section 26 was intended to apply narrowly to publishers of encylopedias and other so-called "composite works." *See* Ringer, *Renewal of Copyright*, Copyright Office Study No. 31, 86th Cong., 2d Sess. 139 (Comm. Print 1960).

The statute as ultimately drafted was, inadvertently, not so limited, an error that, understandably, led the courts to construe the provision to apply to works of formal salaried employees outside of the composite work context. *See, e.g., U.S. Ozone Co. v. U.S. Ozone Co. of America*, 62 F.2d 881 (7th Cir. 1932). Significantly, however, until 1966 section 26 was *not* applied to works of independent contractors *See Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966). Examining the case law construing section 26 over the preceding forty years, Borge Varmer, in an important study on work for hire prepared for the Copyright Office in 1958 in connection with the effort to revise the 1909 Act, concluded that section 26 of the 1909 Act was limited to salaried employees:

> The statutory concept of employment for work for hire is based on the specific contractual relationship between employer and employee. The courts have not given a definition of that relationship which will cover all situations that may come up, but all the cases have involved salaried employees who received either a fixed salary or a minimum salary plus commission. . . . Hence, it may be concluded that section 26 refers only to works made by salaried employees in the regular course of their employment. Varmer,

Works for Hire and On Commission, Copyright Office Study No. 13, 86th Cong., 2d Sess. 130 (Comm. Print 1960) ("Varmer, *Works for Hire*").[5]

Unpublished works generally were not subject to federal protection and instead were protected by the states, which applied common law presumptions in determining ownership of copyrighted works. Decisions involving unpublished works had not considered them to be works for hire, but had instead treated them as involving an implied transfer of rights from the creator to the commissioning party. *See Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 31 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940). It was against the background of this narrow application of the work for hire doctrine that Congress embarked upon its effort to define work for hire in the 1976 Act.

B. The 1976 Act Retained the Traditional Concept of "Employee" in Subsection (1) and Established Subsection (2) as the Exclusive and Limited Authorization for Work for Hire Treatment of Commissioned Works

The 1976 Copyright Act completely revised the 1909 Act. It represented the culmination of years of study by the Copyright Office and was the result of many congressional attempts to restructure what everyone considered to be an antiquated statute. *See generally* Patry, *Copyright Law* 118-120.

The most significant innovation introduced by the 1976 Act was a unified statutory copyright law. In Section

[5] Petitioners' citations to Varmer's study are disingenuously selective. On page 21 of their brief they cite the study in support of their argument that supervision and control has always been the dividing line between employees and independent contractors. Pet. Br. at 21. Buried in a footnote six pages later, in a different context, is a fleeting reference to Varmer's *contrary* conclusion: that the determining factor was whether the work was created by "salaried employees in the regular course of their employment." *Id.* at 27 n. 10.

301(a), which provides for the preemption of common law copyright, Congress eliminated all common law rules and presumptions that had determined whether commissioned works were owned by the creators or by the parties that commissioned them. 17 U.S.C. § 301(a). In their place, Congress established new specific guidelines in the 1976 Act's definition of "work made for hire."

The legislative history of much of the 1976 Act, especially its work for hire provisions, is unusual both because the critical developments in the statutory language occurred long before the legislation became law in 1976, and because of the extensive participation of the private sector and the Copyright Office in drafting the Act.[6] An understanding of the negotiations between the private sector and the Copyright Office occurring between 1958 and 1965 thus is essential to ascertaining the legislative purpose underlying the 1976 definition of work for hire.

In the late 1950s, Congress appropriated funds for the Copyright Office to undertake a comprehensive program of research and study designed to produce draft legislation. Thirty-five monographs covering every significant

[6] *See Mills Music, Inc. v. Snyder*, 469 U.S. 153, 182 n. 6 (1985) (White, J. dissenting): "[T]he Copyright Act is unusual in that much of it . . . was drafted by the Copyright Office, which is itself an arm of Congress"; *Dumas v. Gommerman*, 1989 U.S. App. LEXIS 281, 9 ("Much of the Act can be seen as a virtual contract between creators and marketers of copyrighted materials. Many of the Act's provisions have considerable impact on these two interest groups without any broader effect beyond. The work for hire provisions are in this mold. In interpreting them, we are properly concerned with what the private interest groups, the negotiators, thought the terms meant when they negotiated and agreed to them. Congress' intent clearly was to embody in the Act the negotiated compromises. We must be careful not to distort the bargain reached after so many years of negotiation and compromise").

area of copyright law were written, and their conclusions were reflected in the 1961 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. (Comm. Print 1961) ("Register's Report"). As noted above, Study No. 13, by Borge Varmer, concluded that works created on special order or commission were not treated as works for hire under the federal act.

1. *The 1961 Report of the Register*

One of the questions posed by Varmer's work for hire study was: "[s]hould the [revised copyright] statute treat commissioned works in the same manner as works made by employees?" Varmer, *Works for Hire*, at 143. The answer of the Copyright Office, contained in the Register's Report, was a resounding no. The Register's Report acknowledged that the conclusory reference to work for hire in the 1909 Act "has been criticized as being inexact because it might be thought to include works made on special commission." Register's Report, at 87. The Report noted, however, that as of that date, "[t]he courts . . . have not generally regarded commissioned works as 'made for hire'." *Id.* To close any loophole that could ultimately allow commissioned works to be classified as works for hire, the Register recommended that the term be defined as "works created by an employee within the regular scope of his employment." *Id.* at 87.

2. *The 1963 Preliminary Draft Bill*

The 1963 Preliminary Draft bill adopted the Register's recommendation by explicitly stating that "[i]n the case of a work made for hire, the employer shall, for purposes of this title, be considered the author and shall have all the rights comprised in the copyright unless the parties have expressly agreed otherwise." Copyright Law Revision, Part 3, Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on

the Draft, 88th Cong., 2d Sess. 15 (Comm. Print 1964) (quoting section 14) ("Preliminary Draft"). In a footnote to that provision, the Preliminary Draft stated that "[a] 'work made for hire' would be defined elsewhere in the statute as a work prepared by an employee within the scope of the duties of his employment, *but not including a work made on special order or commission.*" *Id.* at 15 n. 11 (emphasis added).

This language unmistakably shows that the Preliminary Draft sharply distinguished between employees and independent contractors. The Draft's reference to "employee" (which eventually became subsection (1) of the 1976 definition of work for hire) was understood by all concerned—even the publishing interests which would have been the principal beneficiaries of an expanded work for hire doctrine—to refer only to a salaried employee and not to an independent contractor retained on the basis of a special order or commission. A contemporaneous statement by the American Book Publishers Council and the American Textbook Publishers Institute noted their agreement that "[w]orks for hire—in which copyright is by law owned by the employer—would be redefined to *include only work done by a salaried employee in the scope of his regular duties*, and would exclude works made on special order or commission." Patry, *Copyright Law*, 120 n. 28, *quoting* Copyright Law Revision, Part 4, Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law, 88th Cong., 2d Sess. 250 (Comm. Print 1964) ("Further Discussions on Draft") (emphasis added).[7]

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[7] Horace S. Manges, who served as counsel for the American Book Publishers Council and the American Textbook Publishers Institute, claimed that the exclusion of commissioned works from the work for hire definition would discourage publishers from using freelancers. Preliminary Draft at 259. Manges recognized that in order for freelancers to be considered employees, "[t]here would be the necessity of putting people on the payroll whom the employers wouldn't want to put on the payroll." *Id.* E. Gabriel Perle,

3. *The 1964 Revision Bill*

The work for hire definition was somewhat modified in the 1964 Revision Bill as a result of other changes proposed by the Preliminary Draft. Federal statutory

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representing Time, Inc., was more explicit in warning that comptrollers and accountants in the publishing industry "start going into a real tailspin the minute they start seeing the word 'employee,' because this means social security, withholding, and all the other attendant mechanical housekeeping tasks." *Id.* at 267. It is apparent, therefore, that the publishing interests that now urge an expansive interpretation of an "employee" work for hire had a different, and far more narrow, understanding of the term at the time the work for hire definition was crafted. Mr. Perle, who obviously was well aware that "employee" connoted a salaried employment relationship, now has signed the *amici curiae* brief of the Magazine Publishers of America, which attempts once more to secure a more expansive reading of the statute than Congress intended.

Mr. Perle also testified before Congress in 1982 before the erroneous expansion of work for hire by the Second Circuit's *Aldon* decision. In contrast to the arguments made in the magazine publishers' brief, Mr. Perle submitted a statement on their behalf conceding that "use of the phrase 'work made for hire' does not make the writer a 'hireling' or 'employee,'" and that "[c]lause 2 of the definition . . . clearly applies to an independent contractor situation." *Hearings Before the Senate Comm. on the Judiciary on S. 2044*, 97th Cong., 2d Sess. 60 (1982) (*"1982 Hearings"*). Mr. Perle's 1982 testimony further belies the magazine publishers' claim that acquisition of all rights under work for hire is indispensable to them: "I submit that magazine publishers rarely use the work made for hire approach. They do not very often need those rights." *Id.* at 50.

Petitioners' reference to testimony by ASMP and the Graphic Artists Guild during the 1982 hearings is misleading. Pet. Br. 41 n. 20. The testimony was submitted in support of a legislative proposal to make explicit what Congress intended in 1976: that a work for hire under subsection (1) can only be a work created by a salaried employee within the scope of his employment. *1982 Hearings* at 41-42. The artists' testimony invoked "common law standards" only to show that courts mistakenly applying those standards to define "employee" were causing "great uncertainty." *Id.* at 41.

protection of copyright had attached under the 1909 Act only upon publication of the work. Before publication, state common law copyright rules governed. In a dramatic departure from this dual scheme, the Preliminary Draft proposed a unified federal statutory system for copyright protection in all tangibly fixed works, regardless of whether they were published. Preliminary Draft at 18 (§ 19). At the same time, the Preliminary Draft recommended that creators be vested by statute with a right of "reversion" in any copyright that was transferred to another party. *Id.* at 15-16 (§ 16). *See* 17 U.S.C. § 203(a)(3).[8]

The combined effect of these two proposed changes prompted publishers to reevaluate the consequences of excluding commissioned works from the definition of work for hire.[9] The common law presumption that commissioning parties owned the copyright in works created on commission under an implied transfer would no longer be available to publishers. Moreover, the reversionary right would allow creators to reclaim any assignment of copyright rights and thereby cut off revenues to the publisher after a number of years.

Fearing that the reversionary right would cause "major economic dislocation" in their industry, publishers

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[8] As the 1976 House Report explained, section 203 was "a provision safeguarding authors against unremunerative transfers." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 124 (1976) ("1976 House Rep."). This protection was needed "because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited." *Id.*

[9] One publisher representative commented that these changes were "so completely prejudicial" that the publishing industry would have to reexamine its willingness to support other aspects of the Preliminary Draft, such as the establishment of a new copyright term lasting the life of the author plus 50 years. Further Discussions on Draft, at 34. *See also* Hardy, *Copyright Law's Concept of Employment—What Congress Really Intended*, 35 J. Copyr. Soc. U.S.A. 236 (1988).

urged that the definition of work for hire be retained intact insofar as it referred to "employees," but that it be expanded to incorporate commissioned works, without regard to the subject matter, "if the parties so agree in writing." Further Discussions on Draft at 274 (joint statement of the American Book Publishers Council and the American Textbook Publishers Institute). This suggestion, along with another publisher recommendation that the reversionary right commence after 35 years instead of 25, was incorporated into various bills introduced in Congress in 1964. 1964 Revision Bill 10 (§ 16 (a)(1)), 31 (§ 54).

Representatives of creators' interests strenuously objected that the publishers' proposal effectively would nullify the reversionary right, which under the terms of the 1964 Bill was inapplicable to works for hire. Irwin Karp, representing the Authors League of America,[10] claimed that publishers would use their superior bargaining position to force authors to sign work for hire agreements, thereby relinquishing *all* of their copyright rights, simply as a condition of getting their books published. 1964 Revision Bill at 239. Mr. Karp urged that the 1964 Revision Bill return to the Preliminary Draft's proposal that works made "on special order or commission" be excluded from the definition of work for hire. *Id.* at 239, 245.

4. *The 1965 Compromise*

This conflict between creators and publishers was resolved in 1965. The compromise negotiated by the parties was included in the 1965 revision bill and is in substance

[10] The Authors League took the lead in representing creators' interests in the copyright revision process. The Authors Guild, which is part of The Authors League, is a member of The Copyright Justice Coalition. Mr. Karp, who retired just last year from representing The Authors League, has together with Barbara Ringer submitted an *amicus curiae* brief on behalf of the Volunteer Lawyers for the Arts in support of respondent.

what Congress enacted in 1976. This compromise, outlined in a joint memorandum submitted to Congress and the Copyright Office,[11] entailed agreement both on the work for hire question and on whether creators of works other than works for hire would be entitled to reversionary rights in transferred copyrights. In exchange for the publishers' agreement to accept the reversionary right, creators consented to allow four categories of commissioned works to be works for hire if the parties expressly so agreed in writing.[12] The Register's Supplementary Report specifically noted that the identification of "four special cases" of commissioned works was intended to exclude all others both from new subsection (2) *and* old subsection (1): "Other works made on special order or commission would not come within the definition [of work for hire]." Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights On the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 67-68 (Comm. Print 1965).

[11] *See Copyright Law Revision: Hearings on H.R. 4347 et al. Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm.*, 89th Cong., 1st Sess. 134 (1965). The parties to the joint memorandum included the major competing interests involved in the copyright revision process: The American Book Publishers Council, Inc.; American Guild of Authors & Composers; American Society of Composers, Authors and Publishers; American Textbook Publishers Institute; The Authors League of America, Inc.; Composers and Lyricists Guild of America, Inc.; Music Publishers Protective Association, Inc.; and Music Publishers Association of the United States.

[12] The compromise definition of work for hire added a new subsection (2) that provided that:

> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for hire.

See Patry, *Copyright Law* 121, *citing* S. 1006, H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, 89th Cong., 1st Sess. § 101 (1965) (definition of work made for hire).

This exclusion was the "quid pro quo" for allowing certain types of commissioned works to be eligible for work for hire status if the writing requirement was satisfied. *See* Patry, *Copyright Law* 121. Subsequent negotiations expanded, by agreement of the affected interests, the enumerated categories of commissioned works referenced in subsection (2) to include compilations, instructional texts, tests, and atlases. The structure of the provision and its purpose, however, remained intact. The final compromise was endorsed by Congress in the first legislative report on the revision bills. *See* H.R. Rep. No. 2237, 89th Cong., 2d Sess. 116 (1966) ("After full consideration the committee has decided to incorporate the substance and much of the language of this compromise in the bill.")

This background clearly shows the process that resulted in the definition of works for hire in the 1976 Act and demonstrates the fundamental distinction established between works produced in the employment context and those prepared on commission. Both the House and Senate Reports accompanying the Act confirm this distinction by stating that "[t]he definition now provided by the bill represents a compromise which, in effect, spells out those *specific categories of commissioned works* that can be considered 'works made for hire' under *certain circumstances*." S. Rep. No. 473, 94th Cong., 1st Sess. 105 (1975); 1976 House Rep. at 121 (emphasis added).[13]

There is absolutely no indication that Congress or any affected interest involved in the revision of the copyright

[13] *See also Dumas*, 1989 U.S. App. LEXIS 281, p. 11: "Thus, in the package as finally approved, works for hire would not be subject to the artist's right to terminate transfers. In exchange, the old tests under the 1909 Act, which favored employers, would be replaced by a new definition. . . . Commissioned works . . . were to be treated as works for hire only if they fell within specific enumerated categories, and even then only if there was an agreement in writing that the work was a work for hire."

law thought that a commissioned work that failed to meet the subsection (2) criteria could nonetheless be treated as an "employee" work for hire under subsection (1). Neither the 1976 House and 1975 Senate reports, nor the events leading up to the 1965 compromise, provide any evidence to support petitioners' theory.

III. THE "SUPERVISION AND CONTROL" STANDARD HAS NO SINGLE UNDERSTANDABLE MEANING, WAS NEVER ADOPTED BY CONGRESS, AND WOULD LEAD TO UNPREDICTABLE AND UNFAIR RESULTS

Petitioners and their *amici curiae* urge this Court to adopt a supervision and control standard for distinguishing between an "employee" work for hire under subsection (1) and a commissioned work for hire under subsection (2). Pet. Br. 30. Under their theory, only those independent contractors who are insufficiently supervised and controlled are covered by subsection (2); regular employees and independent contractors who are adequately supervised and controlled are classified as "employees" under subsection (1). Adoption of this theory would be erroneous for several reasons.

First, the cases decided between 1966 and 1976 that applied a supervision and control test to commissioned works of freelance creators were not considered during the compromise process described above. Those cases were superseded by the 1976 Act. The interpretation of work for hire reflected in those cases is simply irrelevant to what the law is now. Moreover, cases that have applied the supervision and control standard after the 1976 Act went into effect are wrongly decided. *See, e.g., Evans Newton Inc. v. Chicago Systems Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986). In finding that a work for hire arrangement arises whenever the commissioning party has the power to supervise and control the creator's work, or has exer-

cised that power sufficient to meet an undefined subjective standard, those courts effectively have made virtually every commissioned work a work for hire—a result that is directly contrary to the purpose of the statute and the intent reflected in the legislative history.

Petitioners' only basis for inferring that Congress intended to adopt post-1966 formulations of the supervision and control standard is the absence of any reference to that case law in the committee reports prepared and floor discussions occurring in 1976.[14] As discussed above, however, the legislative history before the post-1966 case law shows an affirmative intent to confine "employee" under subsection (1) to salaried employees and not to extend an employment test to commissioned works. There was no need for Congress to discuss the intervening case law that was inconsistent with that intent, since Congress was enacting a compromise agreed to ten years earlier. Even if Congress was aware of those cases, they did not change the deal that had earlier been struck.

As this Court has recognized, reliance on congressional silence concerning preceding case law as evidence of affirmative intent is at best a questionable proposition. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 n. 15 (1971). Such reliance has occasionally been deemed appropriate where Congress is continuing the same statutory scheme that the courts had been interpreting. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-85 (1983). But where, as here, Congress revamps the entire statutory scheme and enacts a definition of a key phrase that never before existed in the statute, congressional silence cannot be accorded the

[14] This congressional silence was the basis for the Second Circuit's adoption of pre-1976 case law in *Aldon*. *See Aldon Accessories*, 738 F.2d at 552.

weight that petitioners' give it. *See General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 653 (1983).[15]

Second, the supervision and control standard produces completely unpredictable results and has been correctly criticized on this ground by both the Fifth and Ninth Circuits. *See Easter Seal Society v. Playboy Enterprises*, 815 F.2d at 331-34 (5th Cir. 1988); *Dumas v. Gommerman*, 1989 U.S. App. LEXIS 281, 15-16. Some courts have held that a work for hire is created whenever the work was produced "at the instance and expense" of the putative employer, or when the employer was the "motivating factor" in inducing the creation of the work. *Brattleboro*, 369 F.2d at 567; *Picture Music, Inc. v. Bourne*, 457 F.2d 1213, 1216-17 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972); *Siegel v. National Periodical Publications*, 508 F.2d 909, 914 (2d Cir. 1974). This formulation of the test is so broad that it sweeps up virtually any work created on commission, since almost by definition a commissioned work is created "at the instance and expense" of the commissioning party. Other courts have employed the equally useless formulation of finding a work for hire arrangement whenever the commissioning party has the power to supervise and control the creator's work. *See, e.g., Murray v. Gelderman*, 566 F.2d 1307 (5th Cir. 1978); *Town of Clarkstown v. Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983). Still other courts have focused on the degree to which the commis-

[15] Moreover, there is a simple explanation for Congress' silence, as noted by the Ninth Circuit in *Dumas*: "The compromise referred to by the [1976] House Report was reached in 1965 as the product of hard-fought negotiations, and was drafted ten years before passage. 'It is therefore not surprising that the early legislative history omits mention of any change in the meaning of the term 'employee,' although plenty of discussion indicates that everyone involved understood the term to mean someone working for an employer in a salaried job, and understood the term to exclude freelance workers completely." 1989 U.S. App. LEXIS 281, 8, *quoting* Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857, 901 (1987).

sioning party actually exercised the power of supervision and control. *See, e.g., Aldon,* 738 F.2d at 552. Since the amount of supervision and control necessary to convert a creator into an "employee" is inevitably a subjective judgment based upon the facts of each case, the work for hire determinations made in these cases vary widely and are not easily reconciled. In fact, even for those courts purporting to apply a standard of actual supervision and control, there is no single understanding of what that standard means.

Third, petitioners and their *amici* blatantly misstate the way the courts have used the supervision and control standard. Petitioners incorrectly assert that the standard has been used to distinguish between alleged specially ordered "employee" works for hire and "non-employee" commissioned works. *See* Pet. Br. at 30. Courts applying the actual supervision and control test have instead used it only to determine whether a work is a work for hire. There is simply no support in the case law for using that standard in the manner alleged by petitioners, and it is telling indeed that petitioners cannot cite *any* support in the 10-year legislative history of the Act for this novel construction.

Fourth, the interpretation advanced by petitioners and *amici* suffers from a logical inconsistency. Petitioners and *amici* appear to assume that employers of regular, salaried employees do not have to meet the supervision and control standard in order to claim the benefits of subsection (1). The courts have so held. *See Easter Seal,* 815 F.2d at 334 ("the contrary result would be almost unimaginable. . . ."). Similarly, petitioners acknowledge that supervision and control is not relevant to works qualifying under subsection (2). Pet. Br. at 30. It can fairly be asked, then, where the actual supervision and control test can be found in the language or legislative history of the statute. If petitioners and *amici* mean to suggest that publishers and corporations *must* exercise a

substantial amount of supervision and control over the work of their staff employees to claim the benefit of the presumption in subsection (1), many works heretofore thought to be owned by such employers will be owned by their employees absent an express written assignment of copyright to the employer.

Finally, policy considerations and principles of statutory construction argue strongly against adopting a supervision and control standard. Such a standard would lead to the wholesale usurpation of freelance creators' rights without their written consent as contemplated by the Act. Moreover, that standard would in effect punish the freelance creator who interacts closely with a commissioning party and thereby risks *post hoc* forfeiture of all his rights. *See, e.g., Peregrine v. Lauren Corporation,* 601 F. Supp. 828 (D. Colo. 1985). The supervision and control standard also would render subsection (2) meaningless since, according to petitioners, *any* commissioned work can be the work of an "employee" within subsection (1) if actual supervision and control exists.

IV. THE RESTATEMENT OF AGENCY SHOULD NOT BE ADOPTED AS THE STANDARD FOR DETERMINING WHETHER A FREELANCE CREATOR IS AN "EMPLOYEE" UNDER SUBSECTION (1) BECAUSE IT CONFLICTS WITH THE FORMAL, SALARIED EMPLOYMENT THAT CONGRESS ENVISIONED AND BECAUSE IT IS NOT MATERIALLY DIFFERENT FROM THE SUPERVISION AND CONTROL TEST

The Court of Appeals rejected petitioners' argument that a freelance creator should be considered an "employee" under subsection (1) if a substantial amount of supervision and control is exercised over his work. In concluding that Reid was not an "employee," however, the court followed the lead of the Fifth Circuit in applying the factors specified in the Restatement of Agency to the factual circumstance of this case. *Reid,* 846 F.2d at 1494. *See Easter Seal,* 815 F.2d at 335.

Both courts erred in using this analysis because the legislative history compellingly shows that Congress envisioned a formal, salaried employment relationship in enacting subsection (1), not the parameters of an agency relationship. Neither the Fifth Circuit nor the court below has cited any evidence in the legislative history suggesting that Congress endorsed the Restatement test or considered it a valid measure of employment status under the copyright laws.

The Restatement standard is also objectionable because it turns on a "right to control" test that would be as difficult to apply predictably as the actual supervision and control standard. In determining whether a master should be held accountable for (and thus, the beneficiary of) the actions of his servant, the Restatement defines a "servant" in part as one "who with respect to the physical conduct in the performance of the services is subject to the other's control *or right to control*." Restatement of Agency (Second), § 220(1) (emphasis added). Similarly, the first factor listed in Section 220(2) of the Restatement requires consideration of the "extent of control which, by the agreement, the master *may* exercise over the details of the work." *Id.* § 220(2)(a) (emphasis added). Under this test, the right of control alone may be sufficient to render a freelance creator a "servant"; the degree of actual control would be irrelevant.

Despite the fact that the Court of Appeals concluded in this case that the freelance artist was not the "servant" of the party that commissioned his work under the Restatement, there is a substantial risk that many, if not most, freelance creators would find an agency relationship (and thus "employee" status under subsection (1)) unavoidable under that standard.[16] Thus thousands of

[16] Even if freelance creators could show in most cases that they were "engaged in a distinct occupation or business," *id.* § 220(2)(b), that they supplied their own tools and equipment, *id.* § 220(2)(c), or that they were employed only for a brief period of time, *id.* § 220(2)(f), other factors would frequently cut in the other direction. For example, it would be difficult for a freelance photographer to show that photographs taken for a magazine publisher were done without any direction or supervision of the publisher, *id.* § 220(2)(e), or that photography was not part of the regular business of the publisher, *id.* § 220(2)(h).

freelance creators working closely with art directors of publishers and corporations would likely end up losing all rights to their works under the Restatement test. This is directly contrary to the language and purpose of the work for hire definition. Ultimately, the Restatement test would be just as demeaning to creators' rights as the supervision and control standard, with no more support in the statute or legislative history.

In *Dumas*, the Ninth Circuit rejected the approach of the court of appeals below, holding that the drafters of the work for hire definition did not intend to require a work-by-work analysis to resolve ownership disputes:

> Because the work for hire doctrine as finally agreed upon in the compromise effects an implicit transfer of copyright ownership while simultaneously destroying the artist's right to terminate the transfer, the drafters wanted a bright line between employees and independent contractors, so that the parties would not be mistaken in their appraisal of the contracted work's status, and purchasers would have little ability to change the artist's presumed status without the artist being fully aware of the change. 1989 U.S. App. LEXIS 281, 15-16.

In order to provide that bright line, Congress created a clearly bifurcated provision that distinguished between formal salaried employees and certain commissioned works enumerated in the statute, free of the uncertainty introduced by principles of agency law.[17]

[17] Petitioner's objection to the alleged "fractionalization" that would result from classifying commissioned works as "joint works" is not a legitimate reason to adopt the supervision and control test. Pet. Br. 30-32. Congress contemplated that copyright would in certain circumstances be owned by more than one party when it enacted the "joint work" definition. 17 U.S.C. § 101 (definition of

CONCLUSION

For the reasons stated above, the result reached by the court below with respect to work for hire should be affirmed. In so doing, this Court should adopt the reasoning of the Ninth Circuit in *Dumas v. Gommerman* and hold that subsection (1) of the definition of "work made for hire" is limited to formal salaried employees, and that subsection (2) represents the exclusive mechanism for treating commissioned works as works for hire.

Respectfully submitted,

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January 30, 1989 * Counsel of Record

"joint work"). In many instances, the interpretation of the statute urged here will vest copyright ownership in a single creator rather than multiple contributors. This is especially true where a contributor to the freelancer's work does not meet the basic requirement of copyrightability applicable to all authors. Contrary to a statement in the Court of Appeals opinion suggesting that the contributions of a putative joint author need not be copyrightable, 846 F.2d at 1496, a contributor does not "create" a work—indeed cannot be an author—unless his contribution is fixed in a tangible form of expression. 17 U.S.C. § 101 (definition of "created"). *See* Patry, *Copyright Law*, 116 (citing cases); *Boggs v. Japp*, 9 U.S.P.Q. 2d 1040, 1044 (E.D. Va. 1988). Unless the copyrightability standard is scrupulously applied, the danger exists that any commissioned work created with the involvement of the commissioning party (and which is not the subject of a valid work for hire agreement under subsection (2)) will not be owned by the creator as Congress intended, but rather by the creator and the investor jointly, simply by virtue of the latter's involvement in the project. *See, e.g., Strauss v The Hearst Corp.*, 8 U.S.P.Q. 2d 1832 (S.D.N.Y. 1988).

APPENDIX A

THE COPYRIGHT JUSTICE COALITION

Advertising Photographers of America

Advertising Photographers of America—LA

American Federation of Teachers, AFL-CIO

American Federation of Television and Radio Artists, AFL-CIO

American Society of Journalists and Authors

American Society of Magazine Photographers

Art Directors Club of New York

Art Directors Club of Washington

Artists in Print

Association of Medical Illustrators

Authors Guild of The Authors League of America

Boston Visual Artists Union

Committee of Interns and Residents

Council of Writers Organizations

- Albany Writers Guild
- Aviation/Space Writers Association
- Boating Writers International
- Chicago Women in Publishing
- Dance Critics of America
- Editorial Freelancers Association
- Independent Writers of Chicago
- International Motor Press Association
- Midwest Travel Writers Association

Mystery Writers of America
National Association of Science Writers
National Book Critics Circle
Outdoor Writers Association of America
Philadelphia Writers Association
Romance Writers of America
Science Fiction Writers of America
St. Louis Writers Guild
Travel Journalists Guild
United States Ski Writers Association
Washington Independent Writers
Writers Guild of America East
Foundation for the Community of Artists
Graphic Artists Guild
National Artists Equity Association
National Cartoonists Society
National Writers Union
Pen American Center
Screen Actors Guild, AFL-CIO
Society of Authors Representatives
Society of Illustrators of New York
Songwriters Guild of America
Visual Artists Association
Writers Watch

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No. 88-293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, et al.,

Petitioners,

vs.

JAMES EARL REID,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF VOLUNTEER LAWYERS FOR THE ARTS INC., BARBARA RINGER, JOHN HERSEY, AND JOHN M. KERNOCHAN, AS AMICI CURIAE, IN SUPPORT OF THE RESPONDENT

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Interest of Amici Curiae

This brief is filed with the parties' written consent.

Volunteer Lawyers for the Arts, Inc. ("VLA") is a not-for-profit corporation which provides legal services and advice to writers, artists and composers.

Barbara Ringer was Register of Copyrights and "is the person most instrumental in drafting the 1976 (copyright revision) Act . . .", *Mills Music, Inc. v. Snyder*, 469 U.S. 153,156 (n. 17). (1985)

John Hersey is an author and journalist; he was President of The Authors League of America for several years, and also was a member of the federal Commission on New Technological Uses of Copyrighted Works.

John M. Kernochan is Nash Professor of Law at Columbia Law School; he has taught courses in copyright and intellectual property law, and is Director of the Center for Law and the Arts, at the Law School.

VLA, Ms. Ringer, Mr. Hersey and Professor Kernochan ("VLA amici") file this brief because of their concern that many writers and artists will lose rights and copyrights if the Court were to accept appellants' (and their amici curiae's) construction of the work-made-for-hire definitions of sections 101(1) and (2) of the Copyright Act (17 U.S.C.)

The VLA amici believe that construction thwarts the meaning and intention which the legislative history establishes. They submit that the 9th Circuit's recent *Dumas* decision correctly concludes that section 101(1), on which appellants and their amici rely, encompasses only works prepared by salaried employees, and that it does not include the works of independent contractors or others, whether or not prepared under a publisher's supervision and control. *Dumas v. Stefan Gommerman, et al.*, 1989 U.S. App. LEXIS 281 (Jan.13, 1989)

Introductory Statement

Committee For Creative Non-Violence, et al., ("CCNV") contends that "Third World America", sculpted by James Earl Reid ("Reid"), is a "work made for hire" within the definition of section 101(1) – i.e., "a work prepared by an employee within the scope of his or her employment." CCNV argues it had "an employment relationship" with Reid that fitted within this definition,

because it supervised his work. Reid was not a salaried employee. CCNV's amici, Magazine Publishers of America, Inc. et al. ("magazine publishers") and CBEMA/IIA, argue that section 101(1) applies to independent contractor authors who prepare works for, and under the supervision and control of, a magazine publisher, computer manufacturer, or other company.

The Court of Appeals Decision

The Court of Appeals held that Reid was not an "employee" within the meaning of section 101(1), but rather an independent contractor under the rules of agency law, so that "Third World America" could not be a work made for hire. 846 F. 2d 1484, 1494. (D.C. Cir. 1988)

The Court of Appeals also held that the sculpture could not qualify as a work made for hire under section 101(2), the second work made for hire definition, which prescribes those types of "specially ordered and commissioned" works which may be considered a work made for hire "if the parties expressly agree in a written instrument signed by them that (it) shall be considered a work made for hire."

Summary of Argument

CCNV asserts that Third World America was not a commissioned work, although it was, because CCNV exercised some degree of supervision and control over Reid; and it erroneously argues that the "very distinction between 'employee works' [sec. 101(1)] and 'commissioned works' [sec. 101(2)] lies in the supervision and control which is generally exercised by an employer." (CCNV Br., at 15.)

We submit that the purpose and intent of section 101's two-part definition of works made for hire, clearly established by legislative history, was to apply section 101(1) only to works prepared by salaried employees. As one eminent commentator put it, section 101(1) was "to be limited to salaried or like employees and would *not* include independent contractors even if their work was closely supervised and controlled." W. PATRY,

LATMAN'S THE COPYRIGHT LAW, 122 (6th ed. 1986), quoted with approval below, 846 F. 2d at 1492. This was the conclusion reached in *Dumas* on the basis of the Court's rigorous analysis of the legislative history of sections 101(1) and (2).

This history establishes that the 9 categories of commissioned works specified in section 101(2) were meant to include commissioned works written by independent contractors who were closely directed by the publisher or other party for whom they were prepared; and that commissioned works not enumerated in section 101(2), and other works by authors who were not salaried employees, were not works-for-hire.

CCNV's amici contend that an author or artist whom a publisher treats as an independent contractor under other statutes must be deemed an employee for the purpose of section 101(1), if his work is supervised and controlled by the publisher. We disagree, since section 101(1) only applies to salaried employees. Moreover, we submit that if the publisher treats the author as an independent contractor for purposes of tax, social security and other statutes, section 101(1) could not apply to him even if it were construed to encompass others than salaried employees.

Also, we submit that Sections 101(1) and (2) established new definitions of works made for hire that superseded judicial definitions of works made for hire under the 1909 Act in pre-1978 decisions.

ARGUMENT

Section 101(1) Applies Only To Works Prepared by Salaried Employees, And Not to Works by Independent Contractors Or Others — Regardless of Supervision or Direction

The decision, as in *Dumas*, that section 101(1) applies only to salaried employees, does not prevent publishers, computer manufacturers or anyone else from acquiring copyrights or rights thereunder in works prepared for them by writers and artists, so long as the publisher satisfies the applicable statute-of-frauds provision of Title 17 — i.e. so long as the publisher obtains a signed transfer that complies with section 201(d), or a signed agreement to consider a commissioned work within section 101(2) as a work made for hire; or has the work prepared by a salaried employee.

On the other hand, for reasons discussed below, if the Court were to adopt the rationale of *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 656 (2d Cir. 1966), or some variation of it, countless authors will be seriously damaged in the future.

A. *The Nature of the Legislative History*

Section 101's work-for-hire provisions evolved in the revision process conducted by the Register of Copyrights under the auspices of the House and Senate Judiciary committees. *Dumas*, 1989 U.S. App. LEXIS 281, at 163-272, PATRY/LATMAN, at 118-122. And, as House Committee Chairman Emanuel Celler explained, the legislative history of the 1976 Copyright Act in large part consists of the Register's Reports to Congress; his draft revision bills; and the comments and discussions of them by publisher, author, motion picture and other groups at panels meetings the Register conducted — all published in the 6 House Committee Prints entitled COPYRIGHT LAW REVISION - Parts 1 to 6. Chairman Celler said the contents of the Prints, and the pre-1961 Copyright Law Revision Studies, "served as the basis for the preparation of the bill H.R. 4347 and its companion S.

1006 now pending in the 89th Congress." (Part 5, p.III) Sections 101(1) and (2) appeared in their present form, with minor exception, in H.R. 4347 (1965-66).

This legislative history is extremely significant in construing sections 101(1) and (2) for it details how and why the for-hire definitions evolved – in 4 four different stages – from the Register's initial 1961 proposal to their present form. The Register prepared these definitions, and major changes he made in each stage were prompted by the comments and positions taken by publisher and motion picture groups ("user groups") and author groups, and by the compromises they made.

The House Judiciary Committee said "the development of the work-made-for-hire provisions of the 1965 revision bill (H.R. 4347) is reviewed in detail at pages 66-68 of the Register's supplementary report, which accurately summarizes them as a 'carefully worked out compromise aimed at balancing legitimate interests on both sides'." The Committee Report also summarizes views of the author and user groups. (H.R. Report 2237, October 12, 1966, at 114-116.)

B. *The Scope of Section 101(1).*

The history recorded in the COPYRIGHT LAW REVISION Prints and House Report No. 2237 demonstrates that section 101(1)'s definition – "a work prepared by an employee within the scope of his or her employment" – only encompasses works made by salaried employees.

1. The Register's 1961 Preliminary Report (at 86-87) said courts "have not generally regarded commissioned works as 'works made for hire' ", and proposed the prospective Bill define works made for hire as "works created by an employee within the regular scope of his employment". The Report said this "more precise definition" (there was none in the 1909 Act) would exclude commissioned works from the for-hire category.

2. The second stage was the for-hire definition that appeared in the Register's 1963 draft bill: "a work prepared by an employee

within the scope of the duties of his employment, but not including a work made on special order or commission." Section 14 (c), n.11, COPYRIGHT LAW REVISION, Part 3. Throughout the subsequent for-hire debate, representatives of user groups recognized and understood that this definition encompassed only works prepared by salaried employees, and did not include works prepared by independent contractors or anyone else – even though written at the instance and under the direction of the publisher or other user.

Thus, Horace Manges, representing the book publisher groups, objected to the definition because ".. There would be a necessity of putting people on the payroll whom the employers wouldn't want to put on the payroll . . ." [June 11, 1963] COPYRIGHT LAW REVISION, Part 3, at 259. The American Book Publishers Council stated that the definition would "include only work done by a salaried employee in a scope of his regular duties and would exclude works made on special order or commission." COPYRIGHT LAW REVISION Part 4, at 250. Similar statements were made by representatives of other user groups. See Hardy, COPYRIGHT LAW'S CONCEPT OF EMPLOYMENT: WHAT CONGRESS REALLY INTENDED, 35 Journal of the Copyright Society of the U.S.A, (April 1988) 210, 226, 227, 232-235.

C. *Supervision and Control are Irrelevant To Section 101(1)*

Because user groups recognized that salaried-employee status, and not supervision and control, was the test of the proposed 1961 definition and the 1963 Bill's definition, they urged the Register to add a second clause to define specially commissioned or ordered works as works made for hire.

1. The Register's Supplementary Report on H.R. 4347 (1965) said the 1963 bill's definition "was strongly opposed by book publishers, among others, on the ground that there are a great many works which for practical reasons are 'prepared on special order or commission' but which by their nature deserve to be treated as works made for hire" and which "are prepared at the

instance, *direction*, and risk of the publisher or producer." (emphasis added). COPYRIGHT LAW REVISION, Part 5, at 66-67.

For example, the American Textbook Publishers Institute, stated that publishers had encyclopedias and other reference works prepared "under their *supervision and control* . . . and that it is not possible to "hire these specialists as employees on a full time basis." COPYRIGHT LAW REVISION, Part 3, at 340-341. (emphasis added). Later, the Institute and the American Book Publishers Council submitted a statement (June 1964) again objecting to excluding commissioned works from the work-made-for-hire category. They proposed a two-part definition : "(a) a work created by an employee within the scope of his employment"; and (b) a work created on special order or commission if the parties so agree in writing."

2. Accepting their proposal for the reasons given in his 1965 Supplementary Report, the Register produced his third version of the for-hire definition in his 1964 Bill : "A 'work made for hire' is a work prepared by an employee within the scope of his employment, or a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire." H.R. 11947, H.R. 12354, sec. 54 (1964).

The Supplementary Report said that this change "drew even heavier fire" from authors' groups who feared that general interest books — novels, biographies, histories, and other categories — might be deemed commissioned works because often publishing contracts are signed, and advances against royalties are paid, before a book is written or completed. The Register said authors groups feared that should this interpretation ever prevail, authors would be compelled to sign contracts containing an express agreement that the book be considered a work made for hire. The Register also noted that many works written on special order or commission, such as serious music or choreography, should not be considered works made for hire. COPYRIGHT LAW REVISION, PART 5, at 67.

3. In order to "reconcile these conflicts" between author and user groups, the Register produced his fourth version of a works-

made-for-hire definition . . . a two-part definition in sections 101(1) and (2) of H.R. 4347 (1965-1966) (ibid, at 67). The 1965 section 101(1) definition is the same as its counterpart in the 1976 Act. The 1965 section 101(2) provides as does the 1976 Act that "a work specially ordered and commissioned use for as (specifying categories of works)" shall be a work made for hire "if the parties expressly agree in writing that the work shall be considered a work made for hire."

H.R. 4347 initially specified the first 4 categories contained in the present section; more were added in its final version, reported by the Judiciary Committee on October 12, 1966 (Report No. 2237). The Supplementary Report stressed that only those categories of specially ordered and commissioned works enumerated in section 101(2) may be considered a work made for hire. "Other works made on special or order or commission would not come within the definition." ibid, at 67-68.

4. The legislative history shows distinctly that section 101(2) was written to deal with the status of works prepared by "freelance authors" — independent contractors — at the "instance, direction and risk " of the company for which they were being prepared. The Register, the Judiciary Committee and the user groups who participated in the drafting of the made-for-hire definitions deemed works created this way to be "specially ordered or commissioned works" - as are Reid's statue, articles and stories written by independent contractors for the magazine publisher amici, and software programs and other works prepared by independent contractors for CBEMA and IIA member companies. Supervision and control do not take these works out of the reach of section 101(2) — it was drawn to include with works prepared at the direction, the supervision and control, of the publisher. As the previously quoted statements of publishers and the Register's Report show, the publishers stressed that they supervised and directed preparation of the commissioned works involved, — and that was one of the primary reasons they advanced in urging that section 101(2) be added — to permit these works, prepared under their supervision and control, to be considered made for hire, if the author or contractor consented.

The Register stressed that types of commissioned works not enumerated in section 101(2) cannot be works made for hire. This, because the purpose of the 1965 author-user compromise, accepted by the Register and the House Judiciary Committee was to prevent commissioned works other than those enumerated in section 101(2) from being considered as works made for hire — in order to protect independent contractor authors against being deprived of their author status under section 201(a).

5. The initial decision in the Register's drafting of the for-hire definition was that only works prepared by salaried employees should be defined as works made for hire. That was modified by the 1965 compromise to provide that certain categories of commissioned works, but only those, could be treated as works made for hire - if the writer or artist signed a written agreement stating that.

Aldon reached the wrong result because the court apparently did not read the legislative history. Here, the Court of Appeals reached the correct result because it read the history, but did not fully apply it. THIRD WORLD AMERICA is a commissioned work; and it is not one of the categories enumerated in section 101(2). Beyond that, CCNV's claim of section(1) employee status (based on supervision and control) is unfounded, because Reid was not a salaried employee.

D. *Threats to Authors If An* Aldon *Supervision and Control Test is Adopted*

If a supervision and control test is read into section 101(1), as CCNV and its amici urge, authors face considerable risk — beginning with the difficulty of being able to predict, or even be aware, that they are entering into a work-made-for-hire relationship.

1. Their statute-of-frauds protection under sections 204(a) and 101(2) will be eroded. If section 101(1) status is determined by a supervision and control test, rather than the "bright line" standard of salaried employment, authors are likely to face more claims of copyright ownership by publishers who could not have sustained suits under *Dumas* or the decision below, absent the

written signed document required under either section. Disproving sufficient supervision and control is more difficult than rebutting a publisher's claim of salaried employment under *Dumas*, and the results are more unpredictable. The difficulties increase with passage of time, more so if the author has died.

The uncertainty of the writer/artist-author's status under a supervision and control standard can place in doubt not only the ownership of a copyright, but also its duration — is its term life + 50 years, or 75 years from publication?

2. A supervision and control test may be interpreted by courts to classify works as "made-for-hire" because of editorial or other practices that had never been thought to negate the vesting of copyright in the writer or composer or sculptor of the work. In that event, even contracts providing that copyright will be in the author's name could not change the for-hire status of the work; that cannot be done by agreement; and authors would lose their termination rights.

A supervision and control test could destroy the 1965 compromise which the Register and the Judiciary Committee implemented in the final version of sections 101(1) and (2) to protect writers and artists against compulsion to accept work-made-for-hire status for their works, and thus preserve the termination rights the 1976 Act gave them. The thrust of the CCNV amici briefs is to accomplish that result — to circumvent the purpose of sections 101(1) and (2).

E. *Section 101(1) Is Inapplicable to Writers and Artists Whom Publishers Treat as Independent Contractors Under Other statutes*

CCNV's amici contend that writers and artists whom they identify as independent contractors must be deemed "employees" for the purposes of section 101(1) if they prepare works for a publisher or other company under its supervision and control.

That claim is untenable for the reasons just discussed. It also is untenable because in a great preponderance of situations, the writers and artists are claimed by the publishers and others in

CCNV amici's consituencies to be independent contractors for purposes of income tax, social security, unemployment insurance, and other federal and state statutes, many of which implicate supervision and control as a test of the employer-employee relationship, impose substantial obligations on employers, and provides economic advantages to employees. If a publisher claims not to exercise a sufficient degree of supervision and control over writers and artists to make them employees under those federal, state and local statutes, it should not be permitted to claim them as employees for section 101(1) purposes. To allow publishers to do so erodes the public policy of enforcing tax, social security, and other laws fairly, and results in a construction of section 101(1) which may violate authors' and artists' rights to due process.

F. *Sections 101(1) and (2) Supersede Pre-1978 Judicial Definitions of Works-Made-For-Hire*

The legislative history leaves no doubt that section 101 (1) and (2) established new definitions of works made for hire that – effective January 1, 1978 – replaced the judicial for-hire concepts of *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F. 2d. 565 (2d, Cir. 1966) and other pre-1978 decisions, as *Dumas* and the decision below properly concluded.

Brattleboro interpreted the 1909 Copyright Act which contained no definition of a "work made for hire", and it was not construing the two-part definition of section 101, which was included in the final version of H.R. 4347 reported out on October 12, 1966. The 1966 Bill's definitions of works made for hire – closely explicated by the 1966 House Report, the Register's Supplementary Report and the legislative history – were carried over into the 1976 Revision Bill, and enacted. The final 1976 House Judiciary report did not disavow the 1966 House Report or the Register's Supplementary Report.

H. *The Joint Works Question Should Not be Considered*

The question of whether THIRD WORLD AMERICA is a joint work is not presented on this appeal, and we respectfully

submit that the Court should not consider it. We do not believe that the sculpture was a joint work, and we disagree with the Court of Appeals' observations on that subject. Suggestions of ideas, instructions and directions, are not copyrightable material. The person who provides them is not a joint author of the work; his "contribution" is not protected by its copyright. We doubt that Reid had the required intent (under section 101) that his sculpture be merged with the pedestal as an inseparable or interdependent work – anymore than the authors of CATS or other recent Broadway musicals intended to merge their librettos, music or lyrics with the expensive stage sets or special effects (including steam) which are a major attraction. The joint works issue has serious implications for authors, publishers, composers, playwrights, film makers and others – and we respectfully suggest that this appeal is not the appropriate occasion for the Court to address this issue.

CONCLUSION

VLA and its co-amici curiae respectfully submit that the Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 88-293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, et al.,

Petitioners,

vs.

JAMES EARL REID,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF VOLUNTEER LAWYERS FOR THE ARTS INC., BARBARA RINGER, JOHN HERSEY, AND JOHN M. KERNOCHAN, AS AMICI CURIAE, FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Volunteer Lawyers for the Arts, Inc. ("VLA"), Barbara Ringer, John Hersey, and John Kernochan respectfully move for leave to file the brief amicus curiae they submitted to the Court and served on the parties' attorneys.

Those attorneys consented to the

filing of the brief on behalf of VLA, and the respondent's attorney informed the Clerk's office that he also consents to its filing on behalf of Ms. Ringer, Mr. Hersey and Professor Kernochan. However, petitioner's attorney informed the Clerk's office, and amici's attorney, that he does not consent to filing of the brief on their behalf.

The issue presented, and the legislative history on which it turns, are of serious concern to the individual amici curiae (as well as to VLA), and they have substantial reasons for urging that the Court allow their brief, and the arguments it presents, to be submitted for them, as well as for VLA.

Ms. Ringer, a former Register of Copyrights, played a leading role in preparing the 1976 Copyright Act. Mr. Hersey was, for several years, President

of the Authors League of America, which participated in the discussions and compromises that are relevant to interpreting the "work-made-for-hire" definitions at issue in this appeal. Professor Kernochan has been concerned with the issue as a professor of law at Columbia Law School, and as director of its Center for Law and the Arts.

The individual amici earnestly believe the views expressed in the brief on their behalf may be of use to the Court, and respectfully ask the Court's permission to file the brief in their names as well as in VLA's name.

Respectfully submitted,

IRWIN KARP,
Attorney for amici curiae
VLA, Ringer, Hersey and
Kernochan

February 7, 1989